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No. 85-530

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

Dennis M. O'Connor, et al.,
Petitioners,

vs.

Magno J. Ortega,
Respondent

On Writ of Certiorari
to the United States
Courts of Appeal for
the Ninth Circuit

BRIEF FOR RESPONDENT

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SUPPLEMENTARY CITATIONS

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Q. And you threw the original notes away that you had?

A. There was only -- I had just started to make the note, and I threw it away. It was no use to me.

Q. How many pages had you written before you threw it away?

A. Maybe two sentences.

Q. And what were you writing down, just making a log of the articles?

A. Yes, whether it was State or -- well, if I could define whether it was State or not State.

Q. You mean whether it should be State or personal property?

A. Right.

Q. And did you ask anyone else who is your superior whether that was okay to no longer log them?

A. No, I did not.

Q. You just decided that on your own?

A. That's correct. Well, I did talk to Mr. Friday and told him it was a difficult task and that I would not make a log, so I did not.

Q. And he said that was all right?

A. Yes.

Q. Do you know if anybody else made a log of these contents?

A. Nobody else did, to my knowledge.

Q. Okay. Mr. Stratton, maybe we better start first: Where are you employed at the present time?

A. Napa State Hospital.

QUESTION PRESENTED

Whether it is a violation of a government employee's civil rights for government officials to make a "two-sentence" administrative inventory of papers in a government office of which he was the sole occupant for 17 years while he is undergoing an administrative investigation, and to impound all its contents until same can be searched for rebuttal evidence against him or his witnesses during his prosecution.

LIST OF PARTIES

Petitioners: Dennis M. O'Connor, Richard Friday, Dorothy Owen, Stephen Donoviel

Respondent: Magno J. Ortega

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth District was filed and entered on June 27, 1985 and is reported at 764 F.2d 703 (1985):

> The record in this case justifies a grant of partial summary judgment for Ortega on the issue of liability for an unlawful search; we will

therefore remand to the district court for an entry of judgment in favor of Ortega and for a hearing to determine the amount of damages.

The judgment of the United States District Court for the Northern District is not reported (nor its interpretation of the Chenkin test accepted: Cf. Addendum: A-65).

The decision adopted by the California Personnel Board on March 17, 1982 is also not reported (nor reportable with the Notices of Punitive Action). [1.1]

--

[1.1] Decision was arrived at before the record was available to the Board (see reply, 'r', to petitioners, p. 36, or r. 36 and Ex. xi). A timely petition for rehearing was submitted and denied. The State Court hearing on Dr. Ortega's petition for writ of mandate has been postponed several times because the full administrative record had not been sent. Only after 'r' had been filed were missing parts received minus an unsigned "thank-you" note (Ex. 15a-1) to the donor of a printer which had started a warrantless search for forged documents (r. 17).]

ADDITIONAL JURISDICTIONAL GROUNDS
Appended in App213

ADDITIONALLY APPLICABLE FEDERAL LAWS
As in Reply to Petition and in A-46

OTHER VIOLATED CONSTITUTIONAL AMENDMENT

14th, Section 1 (r. 52): All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE (r. 3) [1.21-.22]

As in 'r', events/allegations (A) and fact-finding/errors (B) will be intertwined below for brevity and accuracy to disprove old and new charges (PB 24, etc.) now "noticed" in the record!

--

[1.2] Cross-references will be made as before to appendix ('a') of reply ('r') to petition for writ of certiorari ('C'). Others will be to respondent's brief (RB) or its addendum (Add.) or to petitioner's brief (PB) or its appendix (PA) to distinguish all from those to Joint Appendix (J.A.) or the separate exhibits (App.).

> Excerpted documentation will be indented on both sides (like this paragraph), preceded or followed by quotations (not one's wishful inferences) from authorities directly addressing the issues under each sub-heading. If documentation and/or citations are too extensive, they may be separated but jointly cross-referenced/indexed.

A. Nature of the Controversy (Cf. App.)

> "(T)he Constitution is meant to be understood by the public."--John Marshall

Fifth and Fourth Amendment personal privileges and property rights violated under color of office brought this suit before federal court for review of civil rights violations under the Fourteenth Amendment and 42 U.S.C. Sec. 1983: This case arises out of a complaint by

--

[1.22] Exhibits 1-21 were petitioners' during administrative hearing, Exx. A-000 and i-xxiv are respondent's.

(I-VI) are days of hearing, (VII) was ordered on the 5th day:p.111/line3 or (V:111/3): "(C)omplete your testimony in writing. . ."

respondent that petitioners (then Napa State Hospital employees at Imola, California) withheld earned income in excess of $10,000 without due process and restricted his rights of movement and assembly by illegally placing him on administrative leave (G.C. Sec. 19574.5). [2.1]

Dr. O'Connor -- (chief petitioner or "King", as in "the King can do no lasting wrong . . .", partly to save precious space to rebut "noticed" new charges and "findings", below) -- asked Dr. Ortega to stay away for one week (II:126, r. 16) so as not to inhibit interviewees (II:85, 86), not the

--

[2.1] Respondent was director of an accredited network (r. 10) for four years of post-graduate training in psychiatry, the only one based in a state hospital (NAPA) in California. It is now, like Camarillo's further south, just another three-year residency training program.

investigators. [2.2]

King also told peon -- (or "pawn", as in ". . . because the Court protects all pawns") -- that he cannot enter the hospital grounds without written permission because Dr. Vaughn, also ex-con, complained of coercion to buy a computer [2.3], but that the ex-con's leave of absence complaint was a "closed issue". (King denied that he pronounced L.O.A. issue dead on II:140-141).

--

[2.2] An unsigned thank-you note (Ex. 15a-1) was later alleged to have made investigators search for forged documents (II:168-170, r. 17-18). Their first ad hoc excuse was that they were only sorting out papers (Mr. Friday's deposition, p. 21) inside peon's second office in Imola (Ex. P, a. 3), which none of them -- or their superiors in the state capitol in Sacramento -- have entered without first knocking and waiting to be invited in, even if the door were open, for the last 17 years. (Many of them, including most of listed "real parties of interest", had also been to pawn's house in Napa Valley where he has another office.)

The King told the residents that Dr. Ortega was on vacation and was "so positive that all would be well Dr. Vaughn ask(ed) about possible retaliation when Dr. Ortega returned. Dr. O'Connor

--

[2.3] The King had already thanked the contributors (Ex. 14) and pledged other computer accessories (Ex. 13), by approving sub-purchase orders for them. But his business manager, Mr. Friday, decided (I:112) the $75-Applewriter was another printer. His King HAD also thanked the donor of a $2,000-printer for "facilitating the dissemination of learning" (Ex. 15b). BUT, if the King had NOT already thanked its donor, he must have pledged a printer because all computers had to have one. So, IF there is a signed copy of the thank-you note to the donor of the printer, its signature must have been forged (II:170, r. 17) by pawn!

IF the King merely forgot (II:62, r. 7), an unsigned file copy (Ex. 15a-1) from pawn's office might YET suggest an attempt to deceive: AFTER his unforged signature was found in a signed copy (15b), the unsigned file copy was STILL introduced as evidence that he merely forgot, to explain WHY forgery was rumored! But Ex. 15a-1 turned up missing in December, 1981, from the administrative record sent to be filed in State Court!

reassured him by saying that Dr. Ortega was not that type of person" (Ex. T-2). King did not lie. [2.4]

After King adjourned the meeting with pawn's trainees, ex-con told them that there was also a "sexual harassment complaint". [2.5]

No complaints before or after the administrative leave order involved accusations which, under G.C. 19574.5,

--

[2.4] Dr. Vaughn was worried that his cheating during the last annual exam would now be used against him, where before cheating among the hard-working was seen as caring enough to do one's utmost.

--

[2.5] "Complaint" was from Dr. Elizabeth Reynolds, and the only one respondent was asked about when he was interrogated (III:6, 15) before he was dismissed without notice. (It was ten years old, before there was any such cause for punitive action against supervisors or co-workers, and Dr. Reynolds had graduated that many years ago, was in private practice, had co-led a seminar in family therapy with pawn, and is now helping him with a book on child development, of which more later.)

require such action (Argument "1-b", below). Nor can an "administrative inventory" investigate any of the complaints, old or new (PB 24, footnote 22). Only after searching pawns papers for forged documents did amateur investigation become an administrative inventory, when no forgeries were found among the file copies of the King's "thank-you" notes (II:168-170, r. 17). What was then inventoried was not in the locked office, but all copies of King's signed "thank-you" note given to the residents, who were ordered to return them and submit their canceled checks to prove that they contributed, or else face charges of insubordination! (More of this under Argument "1-c".)

Respondent is a board-certified specialist in psychiatry (1966), the youngest foreign medical graduate in

1959 to have received a special diplomate certificate. He had been Chief, Department of Professional Education, Mental Hospital, State of California, for almost two decades, without any written complaints against him, or any interruption of annual merit salary raises, the last for $3,648 on July 1, 1981! (For the King's bureaucratic dereliction of civil servant's duty, see II:136.) [2.6]

Respondent had a three-month-old grievance (the first he ever lodged) against Mr. Friday (r. 8). California State Civil Service is governed by laws that, in the spirit of the First Amendment, mandate early and open redress of --

[2.6] It is curious that Dr. O'Connor's first "performance report" on Dr. Ortega, -- who accepted him for psychiatric post-graduate training and awarded him for outstanding performance on graduation 10 years before, -- is a Notice of Punitive Action!

grievances before formal hearings, as well as periodic written reports to decide any proposed punitive action.

Whether because of the Peter Principle of progressive promotion up to level of incompetence or to discourage doctors from competing with cheaper professional managers, all hospital board certified diplomates in any specialty get about the same salary, -- whether as administrator, clinician, or educator, -- which is much higher than if one accepted a desk job at headquarters in Sacramento. [2.7]

Hospital doctors who are not specialists get paid twice as much as residents receive as stipend. These "grants" --

--

[2.7] Dr. O'Connor refused offers of promotion to headquarters as long as increase in power meant a decrease in income. The salary offered had to be higher than he received as a psychiatrist before he would commute from Napa to work in Sacramento.

equal opportunity employment otherwise demand comparable salaries -- come from different agencies, state or federal, or from private income, usually their husbands'. Residents who obtain their medical license after the first year of training thus forego at the very least about $1,000 a month for three more years of tuition, if they opt not to join hospital staff. (Some drop out of the program to work, and are then counted in staff/patient ratios for budgeting level of care, and then drop back in to specialize in psychiatry, investing in themselves than in another car, etc. Before Dr. Ortega came, no alumnus of what was then the Napa-Sonoma residency training program passed their national boards specialty certification examination as psychiatrists on the first sitting.)

Only formally a Chief of Professional Education, Mental Hospital (or C.P.E., M.H.), respondent was full-time director of post-graduate training in psychiatry at Napa and other affiliates in Northern California (r. 10) over a 100-mile radius. [2.8]

Petitioner Friday, who had illegally delayed (under G.C. 14780 in Addendum) transmitting a computer training contract to departmental headquarters (r. 8), secretly seized respondent's hospital office before 0800 hours on --

[2.8] Most C.P.E.'s do not run residency programs, and another, J.E.J. below, lost hers in another hospital which lost its mental patients to make room for those who are developmentally disabled. (She had been at Napa half-time by respondent's invitation since then, to help with continuing education for professionals on the hospital staff.) Pawn's wide network of variedly prestigious affiliations kept his program accredited, even after Napa State Hospital was transferred to the Department of Developmental Services.

Friday, July 31, 1981 (Exhibit T-2, Declaration to Federal Court by Dr. Gandhi on March 9, 1984). [2.9]

Pawn's office locks were changed before respondent had officially started his forced "vacation" or illegally ordered administrative leave (Ex. R, r. 14-15). When it was officially over, and as he does every week-end it is idle, he returned to the hospital to pick up the "professional education department's computer" (as the King calls it, Ex. D-1).

Respondent's office key did not work,

--

[2.9] Counsel, in PB 24 and by disagreeing with J. Marshall (above), would rather spare petitioners "the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." (This quote had been taken out of context, as were citations in 'C'. "'Essential' Omissions" from 'PB' and 'C' are listed in Addendum, A-12 to A-38.)

but the computer room key did. [2.10]

It was later falsely alleged that petitioners seized his office only after the computer had "disappeared". [2.11]

Just before noon, a memo (Ex. S) extending pawn's administrative leave indefinitely, effective 0800 hours that Monday, was hand-delivered by an administrative trainee-investigator (Mr.

--

[2.10] On re-cross-examination, pawn's secretary testified that her husband had already heard from the business manager, Mr. Friday, that Dr. Ortega had been dismissed (II:21) when she notified hospital security that, as usual, Dr. Ortega had called to ask whether he had office appointments that Monday morning, Aug. 17, 1981, and to tell her he had taken the training computer to work in his office at home. (Ex. 10)

--

[2.11] Mr. Friday, as head of a team of amateurs investigating respondent, tried unsuccessfuly to get a court order to retrieve the training computer from respondent's office at home after it "disappeared" from another locked office adjoining respondent's.

Arnold). [2.12]

Pawn was not even asked about the computer (hospital business inventory does not list it as government property). [2.13]

Only later -- (Mr. Stratton's federal court deposition, p. 60) -- did pawn

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[2.12] Ex. S was back-dated the Friday before, one copy also to be sent to his office in the hospital and another to the wrong box in the federal post-office on the grounds which he has rented for both personal and professional correspondence for the last 17 years.

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[2.13] Dr. Ortega learned later that all his personal effects had already been hastily boxed the week before, and 22 or more numbered, sealed with tape that read "Evidence, Napa County Sheriff's Department" (Exhibit i-e), and moved. Some of his papers were copied: a few copies turned up in federal court after summary judgment had been handed down (Cf. Untimely Submissions in Addendum), submitted in secret by state counsel!

Pawn was not told where they were stored, nor when they would be returned (without the originals that had also been copied).

find out that selected folders from his locked files had already been removed to a safe ("evidence locker"). [2.14]

Investigators began to spread the rumor of sexual harassment by calls to pawn's correspondents out of state, and broadcast their suspicions of forgery (II:168) and fraud (Ex. xxi). [2.15]

Covert threat was to deprive pawn of reputation and license privately to practice his profession and of his

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[2.14] Second attorney of record equates this with "the common practice of a fellow employee's entry of an office to obtain a file or piece of correspondence, or borrow a paper clip" (PB 16, hereafter briefly referrable as the old "Square One" stance).

'PB', therefore, no longer claims the "essential" lie (a. 1) about removing "three personal items" (C. 3)!

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[2.15] Illegally extending the search for incriminating evidence extra-murally with leads drawn from medical files (King's deposition, Argument "2-d") violated of G.C. Sec. 11180.5.

employers' contribution to his pension after termination as educator if offer to accept his resignation did not work.

On August 28, 1921, Dr. O'Connor directly dismissed respondent by phone without written charges, promised to meet pawn personally, and then called back to back off from his promise, unless a co-petitioner was present. [2.16]

Four days later, after pawn had already been dismissed (Ex. 1), an undergraduate who was no longer at the hospital as a temporary student professional assistant improperly

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[2.16] Respondent protested through S.P.B. and appealed for referral to the Secretary of the Agency of Health and Welfare (Exhibit N) along grievance channels established under S.P.B. Rule 540, as mandated by G.C. 18714(a) to provide immediate redress (Cf. Add.) under the State Constitution in the spirit of the First Amendment.

complained of "sexual harassment": she was never under pawn's supervision. [2.17]

To proceed without resolving earlier grievances is unconstitutional under the State Civil Service Act. [2.18]

Dr. O'Connor announced in the HOSPITAL BULLETIN of Sept. 30, 1981, that "Dr. J. is a Chief of Professional Education and with her new duties, will be expanding her time base from one-half time to full-time. This change will take effect on October 1, 1981." [2.19]

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[2.17] Notice of Punitive Action dated Sept. 14 changed the effective date of respondent's dismissal to Sept. 22, 1981, but before he could protest against the written charges, Dr. Ortega was told a State Personnel Board hearing on his appeal had been scheduled for October 29, 1981, ahead of others already appealed (r. 21, CAAP Sec. 2.41 in Add.)

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[2.18] By disregarding its own rules (r. 21), S.P.B is therefore denying a jointly protected constitutional privilege to a California citizen.

It was openly claimed that petitioners have succeeded in depriving pawn of his retirement pension (Exx. T-2, -3). [2.20]

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[2.19] At one point, reiterated in PB 4, last line, to explain the expropriation of all his personal belongings, it was alleged that Dr. Ortega's office had to be vacated for his replacement even before he was dismissed in August without written charges.

J.E.J. did not want to take pawn's place even after he was officially dismissed, effective September 22, 1981. Dr. Ortega's office was never occupied while J.E.J. was in the adjoining office that he had given her.

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[2.20] Pawn was also told will be charged with Medi-Cal fraud (Ex. xxi, r. 53) and may be arrested before he can be tried for whatever else the "administrative investigation" may turn up (Exhibit L, r. 22).

B. Administrative Proceedings (Cf. App.)

To hold formal hearings before discovery can be completed was denial of due process, even if the hearing is quasi-judicial, but again essential in order to dismiss without documentation (Cf. App.)! [2.21]

Had the ground rules of G.C. Sec. 19302(a), 19303(a) and that of others cited (Cf. App151-153) been honored, much could have been saved.

Respondent has not yet recovered his social and professional reputation, and he has been "bad-mouthed" as a "woman-izer" before, during, and after the

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[2.21] On the eve of pawn's administrative hearing, a graduate student complained of being importuned three years before (I:39) when she briefly trained as an intern in the hospital social service department and opted to attend pawn's case conferences for the duration. She was "found" to be a "social worker" in Sacramento by the time she testified. Pawn did not even recognize her!

hearings by the publicity no other hearing had received before or since. Even in the tennis courts, he has been shunned by wives of mixed doubles teams. His wife suffered from cardiac irregularities (Ex. LL) after the charges against him were given unprecedented publicity. And he has not been able to afford to get away, except within driving distance of home, ever since.

INTRODUCTION AND SUMMARY OF ARGUMENT

Secrecy about California's intentions to search, seize, store, and steal contents of locked office was preserved throughout under (1) the umbrella phrase "investigation of management practices". During the administrative hearing, concern was expressed over (2) the "disappearance" of the "Professional Education computer" (Ex. D-1) from an adjoining office. Only in the federal

court did concern over (3) the residents' records (which were all filed outside respondent's locked office) become another excuse for breaking-in and burglary. To have raised it before would have reduced the credibility of complaint of coercion voiced by ex-con, whose record contained a report of cheating during the residents' last annual exam.

At no time was (2) the computer or (3) any files asked to be returned as hospital property. Neither the contributors nor the records nor (4) the residents themselves had ever been the hospital's responsibility, since (4) are not salaried as staff, and their training stipends and (3) equipment (e.g., of video studio) and administrative support come from different sources, personal or federal as well as

several state agencies. In fact, Napa's patient population was less and less a learning resource for clinical training in general psychiatry. Napa is more generally useful in facilitating paper processing and building maintenance for the professional education department, which keeps expanding its network of affiliations while the hospital itself shrinks. But any State remains liable for damages it could have avoided inflicting upon any civilian, employee or unemployed.

> An employer is required in all cases to indemnify his employee for losess caused by employer's want of ordinary care. Deering's Lab C Sec 2800.

If due process was violated by the search and seizure which led to the late Dr. Laskay's "preliminary internal investigative report", submitted after the adverse public reaction to the sum-

mary judgment -- Cf. Addendum, A-65 -- then even petitioners' decision to dismiss (the discipline imposed upon respondent on the basis of the investigation) is void.

1 Am Jur Proof of Facts 2d 549:

> Evidence of facts (BRAVERMAN v. Rosenthal, 102 CA2d 30, 226 P2d 617) or statements (MILSAP v. National Funding Corp., 57 CA2d 772, 135 P2d 407) inconsistent with the employer's contentions may be introduced to demonstrate the employer's asserted reason for a discharge was not the true reason.

There were two SERIAL excuses for privacy violations advanced in tandem:

1) 1st TWO weeks: suspicion (III:170, Ex. 15a-1) that Dr. O'Connor's signature to the thank-you note to the donor of a printer to hook-up with a computer bought without state money was FORGED, which warrants a warrant, and

2) AFTER August 17: recommendation in the "Misdemeanor/Incident Report of "Missing

Property" (training computer) that "this matter be turned over to the committee who are reviewing Dr. Ortega's department at this time, to determine if any CRIMINAL activity has occurred". (Page 2 of Exhibit 10).

Either, AND certainly both, will secure a search warrant. But the investigators knew they will have to specify what to look for, and that will not do, for they have not found anything so far. By Sept. 14, it was finally decided to work under the cover of qualified immunity for General Rubin (Deputy State Attorney) who kept COERCION out of his Notice of Punitive Action but took custody of expropriated private property.

Petitioners claimed (C. 3) that after their administrative inventory "to determine what records and other State

property was there" ("in respondent's locked office"), "three personal items", -- a semi-nude professional photograph of a model (Joyce Onne), her self-composed valentine card and a "standard book of poetry", -- "were removed as relevant to the pending personnel investigation against respondent." Were they seized because they were work-related? Or tantalizing? [I:a]

It is plain to see why petitioners want to go back to Square One (borrowing paper clips, PB 16) and plead that they are not being sued for the proper violations, after having been refused permission to plead their "good faith" --

[I:a] 'PB' is quite suddenly thunderously silent about what "were removed as relevant". Does their silence now mean a "No contest" plea? Or has their "amor propre" prevented candid acknowledgement of mistaken judgment that demeans and negates the cost-conscious bottom-line values their petition symbolizes?

to a jury. But, just in case that is also too late to raise, another justification for their position has been introduced, this time about having sued respondent improperly to begin with (details in Argument "1-a", Add.). [I:b]

After the S.P.B. hearing had started, state counsel threatened to use (Ex. JJ-2, r. 26, a. 6) and did use (III:90 - 92) Dr. Onne's "personal items" against Dr. Sutton's declaration (Ex. P) of long accepted practices that made respondent personally effective and hard to replace (a. 2).

II:3/10: After receiving Exhibit P:

> Mr. Rubin: At the hearing, I volunteered to present to Dr. Ortega some additional materials which have become relevant, only as a result of --

[I:b] 'PB' is a selective reiteration of 'C' and both show ABSENCE OF (1) regrets (apologies), (2) remorse (guilt), (3) reflection, and (4) reconsideration.

> the first hearing, when he handed me some statement of a former staff member of the hospital. [I:c]

The State seeks not only to invade personal privacy in government property but to violate professional confidences. (Cf. Dr. O'Connor's federal deposition, pp. 60, 73.) Confidentiality is an even older protected privilege than the tradition that what does not belong to the state belongs to its citizens. (Cf. Argument "1-c".)

Petitioners deny that a professional has privacy and property rights to his professional and personal files. In fact, permanent employees have property rights to their jobs besides, from which they can only be dismissed for cause. A

[I:c] The "female medical resident" (Dr. Onne, C. 3) has thus metamorphosed into a "former staff member" (Dr. Sutton, a. 6) and second attorney of record's thunderous silence, after reviewing the record, is now audible.

"sorcerer's chase" (Cf. Conclusion) for a cause to dismiss, even after elimination of inapplicable sub-paragraphs of Sec. 19572 (below), can be interminable. General Rubin had added two more (Cf. App. on Nature of Past Controversy) after the hearing was over, and second attorney of record still another in his 22nd footnote (Cf. Argument "1-a", Add.; PB 24.) The chase to prove secret sexual and coercive powers had first taken three amateur investigators -- one of whom, Dr. Laskay, is not a permanent employee, but an applicant for respondent's job after dismissal -- six weeks, and now three shifts of lawyers have extended it to five years. (Cf. VII:383, 387)

'C' also claims that "(o)ne of the state employees made several attempts to sort through the items in the office

trying to separate and identify State property from other items. Finding the task impossible, he eventually boxed the contents of the office and placed them in a locked room for the doctor to pick up". They had been "sealed" before respondent was dismissed with tapes which read in red letters, "Evidence, Napa County Sheriff's Dept.", and marked "Personal Property of Dr. Ortega, Oct. 7, 1981" (Exhibit i-e). Yet, General Rubin denied respondent's request to surrender them (Ex. W, r. 23) on Oct. 20, 1981, 6 weeks after his dismissal by phone.

It is easier to see now why returning to Square One is preferable to the prideful and prudent than pleading "No contest": Under the Fourteenth Amendment, the state does not need to act; it can, by inaction, deny equal rights. By

its own action, it has also violated state and federal laws according to the the authorities cited under points (a) to (o) in Arguments One to Three.

Both action and inaction are indisputably attributable to the state in the person of its accredited (if not rightful representatives, e.g., Dr. Laskay, administrative trainee Arnold), as in the denial of the right to confront witnesses by the refusal of the quasi-judicial hearing officer to issue subpoenas. The fact that the State must accredit the perpetrators for civilian (and human) rights to be violated means that the Constitution limits it in the interest of the basic freedoms that our Bill of Rights seeks to preserve. It is because the State enjoys a monopoly of power (which even the Court does not contest) that it is restrained from

coercion (by the Court with which it is not in contest). [I:d]

The State was also worried about the confidential trust BETWEEN investigator and interviewee, and hearing officer agreed that was privileged under a non-existent law (II:151), but not about the privileged communication between a

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[I:d] Only the Court, which cannot raise armies or levy taxes, enjoys perfect immunity, precisely because it cannot conscript or tax. Counsel is worried about the dollar cost (hereafter BLC or "bottom-line-consciousness) if this Court does not protect the King against his pawns.

B.L.C. was never a consideration for granting borrowed sovereign immunity, divine or secular, to Churches (sanctuaries), embassies (visitors) or executives (civilians).

Prosecutorial (Cf. Argument "2-d", footnote [d:4]) and quasi-judicial immunity are both less defensible in practice or fiscally (a. 7-10).

Cf. Add.: criss-crossing evolution of official immunity and personal privacy.

doctor AND his private patients whose files were desecrated. For loyalty to informers, the hearing officer defied a court discovery order (Ex. H), but turned his back on the judiciary.

If (1a) the hearing officer was biased and (1b) respondent should not have been dismissed, the State must have acted out of (2a) racial bigotry (jingoistic) AND (2b) sexual prejudices (miscegenophobic, Cf. App48) OR in cahoots with other parties (3) to steal Dr. Ortega's training funds (II:80), or to bag BOTH birds (dismissal and positions, r. 17) with one idly thrown stone: an ex-con's speculation about COERCION of contributions to a training computer the residents themselves wanted to use before their graduation (V:82).

If the proper way to view any violation of civil rights is as a whole,

-- as the decision against "separate but equal" education did, -- to do so is to weigh the CUMULATIVE EVIDENCE. The proper decision must address the question as to whether or not "administrative inventory" of, ever includes "impounding" all, non-contraband personal effects, and was so intended from the start and thoroughly implemented as such, in the light of all the facts.

The issue is not only whether every piece of evidence proves the violation of a protected or cherished right, which each easily does (a-o), but whether it is likely that all the relevant acts together (i to x, below) would have occurred without the initial excuse and abuse of (i) an invented and inventive "administrative inventory":

If an inescapable conclusion is that 'inventory' means 'impounding', not only

of "work-related" material but all personal memorabilia, then petitioners clearly have no right even to ask the Court for permission to proceed with a clearly illegal procedure. [I:e]

If (1) "the King can do no wrong --

[I:e] The shallowness of the pretext to exclude peon indefinitely and simultaneously to impound what is non-contraband and purely personal is highly suspicious of latent fears or concealed malice or both, since they usually coexist because they defend against and need each other or else malevolence is undeniable. (Can what is private to one be very disturbing to the deprived, and privacy must be guarded to preserve harmony as well as to reserve to oneself what is nobody else's business, shameful or not?)

Unchallenged to date is the principle that it is the invasion of privacy in a peon's rightful place, not the disturbance of property in a government castle, which the law seeks to prevent.

This precedent in law appears in Dr. Ortega's petition for writ of mandate but was never addressed, like all specific citations of case law and the California Constitution that respondent sent in advance of 'PB'. (Is their silence silent concession?)

because the Court can right every wrong" (respondent's paraphrase, Argument One),

(2) "American independence was then and there born" with the victory of the Fourth Amendment (Justice Frankfurter, UNITED STATES v. RABINOWITZ, 339 U.S. 56, 69-70, quoting John Adams, Argument Two), and

(3) "(t)he right to be let alone is indeed the beginning of all freedom" (Justice Douglas, PUBLIC UTIL COMM'N v. POLLAK, 343 U.S. 451, 467, Argument Three),

then "the final end of the State to make men free to develop their faculties" (Justice Brandeis, WHITNEY v. CALIFORNIA, 274 U.S. 357, 375, cannot be served by "administrative inventories".

The King is now before this Court to obtain immunity as sovereign, and the pawn only because only the Court has

absolute immunity or it cannot right all wrongs.

It cannot be seriously argued that California cannot train its psychiatrists without stealing Dr. Ortega's papers. (A copyrighted manuscript on senso-socio-sexual development is still missing.) The state does not claim educational enthusiasm to develop its citizens' faculties to the full as its end, only missionary zeal for non-erotic order and miserliness (B.L.C.)!

Did Dr. Ortega present a clear, present, and substantial danger to the interests of the State? Is he a dangerous man? Was he a public enemy or even privately evil? What is the wise and proper use of judicious decisions in reconciling power and freedom? Is the State getting weaker and the individual more licentious?

In this case the Court might have to choose between the people's mandate and legislative will against executive willfulness and "malevolence" (Cf. SCREWS in Add.)! California secured the right of privacy of every man, woman and child, retarded or not, by referendum, in the very first article of its Constitution. Can the subsequent legislative expression of it be declared unconstitutional to give state officials immunity in impounding personal property? [I:f]

In summary, respondent questions

i) the constitutionality of an "administrative inventory" by biased fellow --

[I:f] People are also protected not only against search and seizure of property which they are legally entitled to possess. Things may even be wrongfully in a person's possession -- stolen goods, for instance -- and the protection applies no less. (See also Justice Stevens in WALTER v. U.S., Argument "2-d", below.)

employees

ii) triggered by trivial complaints but

iii) conducted in employee's absence

iv) during an administrative leave improperly intended to separate him from his associates and

v) illegally ordered to facilitate search, seizure and stealing of souvenirs

vi) to blackmail pawn's possible witnesses in a quasi-judicial hearing

vii) hastily scheduled and unfairly conducted to dismiss a peon whom none of his employers has ever reprimanded or even criticized in 17 years by

viii) intimidating his legitimate union representative and thereafter

ix) withholding his already earned income to prevent hiring private lawyers

x) after failing to deprive him of his employers' contributions for over 17 years to his retirement pension by

convicting him of fraud (r. 40).

Pawn's answer is that there has been no administrative inventory (high-sounding excuse ended with "Maybe two sentences" in all, A-57), there has been no orderly investigation but a "sorcerer's chase" even in later briefs charging new causes for dismissal, no hearing but an inquisition jumping to conclusions, no trial but a lynching party passing summary judgment, followed by an exclusive ex-parte (Star-Chamber) post-mortem prompted by a dead man's discovered diary. [I:g]

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[I:g] Whether or not God Hirself is dead, the King and his queens (pawns who have pushed to the eighth rank from Square One and cannot take being scorned) must be both tender-hearted and tough-minded, and ruthless and hard-nosed only with foreign enemies in our bosom or in Granada, etc. If they are not, the Court must ask the King change his ways and/or his courtiers for the sake of his subjects.

ARGUMENTS (Facts, Points, Authorities)

Cf. Reply to Petition (r. 41 - 59) for additional facts, points, authorities.

Each argument (1-3) introduces its points (a-o), all ending by summing up.

ONE

THE STATE MUST ONLY BE AS

STRONG AS IT NEEDS TO BE.

This is the reason behind our system of checks and balances that is unique in the American Constitution:

"The King can do no wrong because the Court can right every wrong."

RELATED BUT SEPARATE PART-ISSUES/EVENTS

"The whole of government consists in the art of being honest." Thomas Jefferson, WORKS, VI, 86.

IN SHORT, secrecy does not allow talking things out. It encourages fighting things out, -- sooner or later, -- or worse, suffering in silence, seething with violence, turning against each other.

(a)

Petitioners' "Administrative Inventory" Was Conducted In Secret, Unnecessarily, In The Civilian Employee's Absence (r. 15, 18-19). Const. Amend. 1,4,5,9.

One of the worst consequences of secrecy is the license it confers upon deceit. Will administrative inventories help the state discharge their rightful responsibility to maintain law and order or, as it has in fact done, encourage lawlessness and disorderly conduct?

Government workers should be shielded from reactionary governments. If petitioners had somehow misled enough people (though voters cannot be fooled all of the time) to reach the floor of the Constitutional Convention, they would likely have argued for special dispensation for state overseers and we would now be living under a Bill of State Rights that says:

> "Office entries and administrative inventories are reasonable if conducted for a work-related concern by government agents." (PB 24)

Petitioners have not claimed that to finish an administrative inventory it must be started in secrecy. But if they had framed the Constitution they would now be likely to argue to include that "reasonable" in the Bill of State Rights can well include proceeding in secrecy.

Because their representatives were not among the Founding Fathers, their followers now want to disturb the balance of powers and ask the judiciary for legislation ex-post facto to justify executive search and illegal seizure of souvenirs in an ADMINISTRATIVE paper INVESTIGATION of fantasied "sexual harassment of other employees and questionable possession of a computer on NAPA State Hospital grounds". PB 24.

"I. During an extended period (from July, 1970 through July, 1972), you sexually harassed a female Medical Resident (one of your supervisees) by stroking her hair as she walked down the hall or was in her office. . ."

Only a team of amateurs will conduct a paper search to clarify that or this:

Dr. Richard Vaughn was asked to speculate about coercion of fellow residents to obtain a training computer after he submitted his complaint about a surprise 6 months'separation (Ex. 4) instead of just a month's further delay of his medical rotation that he requested of Dr. Ortega. The idle suspicion of coercion was repeated verbatim as credible by the Personnel Officer (co-petitioner Owen) in her report to Dr. O'Connor. (Ex. 7.)

[Dr. Ortega had already told his ex-con that the 6-month clerical error was typographical (r. 12, I:52), and to

return the check that came with the notice. To assess ex-con's chronic suspiciousness, see his version of his conviction for fraud, I:47.]

II:103/19-24 (a. 20): None was coerced.

Dr. Laskay likewise denied coercion:

> "I do not recall any of the residents saying they had been coerced. That was not the charge." (III:9)

To protect Dr. Vaughn's credibility as a witness against impeachment by existing documents in the residents' records, a whole series of improprieties followed on the part of state employees:

1) Personal papers were impounded illegally with ease (during petitioners' initially protective and misguided search for incriminating evidence against ex-con) by some of the investigators interested in finding out about pawn's very private affairs.

2) To allow finding of "shock" at L.O.A. (mixed up with A.L. in PB 24!) on the part of ex-con in Proposed Decision (a. 19), the record of of the first day of hearing did not include p. 71 (recovered from S.P.B. archives):

> Dr. Ortega: When you left my office, you asked me to get the paperwork so that you don't get paid?
>
> Dr. Vaughn: I said if you thought you could deny me my salary, that you'd best get started because I intended to fight you about it.

Co-conspirators among petitioners could only corroborate (r. 13) the groundless suspicion they shared. Cf. I:52,58,98 (r.14), IV:40 in Appendix.

4) By the time Dr. Ortega deferred cross-examination of the first day's witnesses, reserving the right to confront them after his petition for full discovery was granted by court on Nov. 2, 1981 (r. 25, Ex. H), Mr. Rubin felt

it safe to recall his only witness to "coercion" to buy a computer, since ex-con would not have to answer questions that might refer to a recent report that he cheated during the annual examination of residents.

Incidentally, it was this report that prompted seizure of Dr. Ortega's office, in petitioners' zeal to protect the complainant whose idle speculations were the only basis for the illegal administrative leave order. (By casually asking the secretaries about training records, they finally located the report where it belongs, locked up with all training performance reports in their own filing cabinets in their office.)

4) Folios IV and VI were transcribed before Folio V. The early pages of Folio V contained damaging validation of original federal complaint of violation

of G.C. Sec. 19574.5 in forcing Dr. Ortega to "take a vacation" as unpaid administrative leave, thus depriving him of income without due process. Cf. App., V:18/10 (r. 51), and II:85, 86.

II:88 (r. 16): Due process was denied.

> Confiscations without judicial hearing and judgment after due notice are void for want of due process of law. IECK v. Anderson (1881) 57 C 251, 40 Am.R. 115, 7 PCLJ 630.

Ex. T-2: Chief Resident re Seizure, etc:

> Fr, 31 July 81: "When we got to the hospital, we found Mr. Friday talking to the secretaries and we were soon told that Dr. Ortega's office was locked, THE LOCKS WERE CHANGED, and that Dr. Ortega had been asked to take a vacation. We were told that there would be a special meeting with Dr. O'Connor on Monday . . . (Emphasis added.)
>
> Mo, 3 Aug: ". . . He was sorry for the investigation but it was the FIRST TIME that two people had complained, in writing, and he was obliged to look into it. . . He was very positive that NOTHING WOULD CHANGE and he spoke very fondly and highly of Dr.Ortega. . . but got Dr. Vaughn . . . sufficiently worried to

make him ask about possible retaliation when Dr. Ortega returned. Dr. O'Connor reassured him by saying that Dr. Ortega was not that type of a person." (The King barely remembers this meeting when cross-examined at the hearing.)

The existing climate did not mandate suspension of assembly or salary.

> The purpose of the constitutional guaranty that property is not to be taken without due process of law is to exclude arbitrary power from every branch of government, it being a restraint upon the legislative, executive and judicial departments. HUTCHINSON CO. v. Coughlin (1919) 184 P 435, 42 CA 664.

In any government of men, but not in law:

1) The covert object of illegal investigation is to discover proof of wrong-doing, rather than attempt to exonerate.

2) The covert object of tardily charging with wrong-doing is to convict, not to acquit.

> In re HAMPTON'S ESTATE (1943) 131 P2d 565, 55 CA2d 543, notice to party when rights are to be affected by a

judicial proceeding is an essential element of "due process of law".

IN SUM, "1-a" argues that secrecy was intended in order to seize and search, even if the salary of the employee on forced leave is stolen in order to steal from his papers what can be used against him. (At least, the Democrats did not pay their Watergate burglars.)

(b)

Divorcing A Peon From His Personal And Professional Associations Was Illegally Accomplished By Placing Him On Administrative Leave Without Pay For A Week, Extended To Two Weeks "Vacation", And Then Indefinitely, Even If The Investigation Was Not Done In Compliance With California Government Code Section 19574.5 (r. 15,19). Const. Amend. 5.

Paid vacation is a supplement to the employment agreement which in effect constitutes an offer of reward or additional wages for constant and continuing service. DIVISION OF LABOR LAW ENFORCEMENT, Dept. of Industrial Relations v. Ryan Aeronautical Co., 106 CA2d Supp 833, 236 P2d 236, 30 LR2d 347.

Pawn was not accused of (v) misappropriation of public funds or property, (i) drug addiction, (u) mistreatment of

persons in a state institution, (k) immorality, or (a) acts which would constitute a felony or a misdemeanor involving moral turpitude. These are the only accusations for which "the appointing power may order the employee on leave of absence for not to exceed 15 days. . . If punitive action is not taken on or before the date such a leave is terminated, the leave shall be with pay." Govt. Code Sec. 19574.5.

A week's administrative leave (II:126, r. 16) was extended to two weeks' "vacation" in order to avoid spreading ugly rumors before confrontation with rival academics (II:80-82, r.17) who chronically coveted training funds from every source (V:35, r. 11).

Respondent had been able to keep those the King called "cannibals" (II:80) away from his budget for 17 years and managed

to expand his program against all odds (III:122, a. 29). While still under "house arrest", he tried to get outside help to investigate old conflict of interest: Ex. SS (r. 11): Ltr to Atty. Gen. (App33)

IN SUM, "1-b" argues that the administrative leave order does not conform to the law that lists what accusations may invoke its provisions.

(c)

To Snoop ("2-d", below), (i) The Grounds Where A Peon's Second Office As Well As The Federal Post-Office Is Located Was Placed "Off Limits" To Him But, Even Worse, (ii) His Associates, In Turn, Were Also Barred From His Office At Home (r. 15, 19, Exx. R, S; AAA, T-2,3, ZZ below). Const. Amend 1, 14.

Ex. AAA: Memo fr Actg Dir, Psy Res Trng:

"August 17, 1981:

". . . The residents are not to have any official business with Doctor Ortega during his period of leave according to our administration. . .

"s/T.L.B."

The First Amendment imposes limita-

tions upon governmental abridgement of freedom to associate and privacy in one's association. USCA Const Amend 1. (KATZ v. U.S., 389 US 347, 88 SCt 507.)

In MARSH v. Alabama, 326 U.S. 501 (1946), the Court held that merely because a corporation owned title to a town, it could not impair ". . . channels of communication . . ."

California has withdrawn the right to exclude from the "bundle of property rights".

First Amendment "procedural rules" -- the presumptive invalidity of prior restraints, the doctrines against overbreadth and vagueness, and the requirements of scrupulous procedural safeguards -- are protective devices to assure adequate "breathing space" for free speech and to avoid the more obvious forms of infringement:

Ex. T-3(f-i), 9/2/81: A Senior Resident:

". . . The general feeling was

that it was a biased investigation but Dr. O'Connor responded that it was not. The credibility of an allegation of sexual harassment which occurred years ago was questioned.

"Complimentary statements about Dr. Ortega as a unique and competent chief were brought up by the residents. There were concerns about Dr. O'Connor's choice of Dr. Brannick as acting chief, and he responded that he didn't know Dr. Jeffress so well.

"I asked Dr. O'Connor whether the memorandum still holds about residents not being allowed to contact Dr. Ortega officially or unofficially was still binding. He said that Dr. Ortega was no longer officially connected with NSH and that the residents should feel free to contact him. He said he would call Dr. Ortega himself one day.

"I also asked Dr. O'Connor if the residents were still expected to produce the(ir) checks and 'thank-you' letters (to them) OR ELSE expect administrative action for insubordination. Mrs. Owens stated that we did not have to, unless there was a court order to do so." (Emphasis added.)

It was particularly improper that after testifying on 12/30/81 about their

need for the computer (V:82, a. 35), the part-owners were warned (Ex. ZZ, below) not to use it for their research projects outside the hospital: It was in their department's second office. Kept there, they knew it cannot be confiscated as "evidence", -- even if they refused to surrender the cancelled checks (proving they contributed) that the hospital demanded (Ex. T-3, above), -- after they found out that Dr. Ortega defrayed more than half its cost!

Is the following embezzlement under color of office even if the embezzler did not benefit:

Ex. ZZ: Memo fr new Psy. Res. Trg. Dir.:

"1/7/82 [AFTER V:82, 12/30/81 (a. 35)]:

> "The computer in Dr. Ortega's possession may not be used by any of the residents during the working day or on any official research projects.
>
> s/J.E.J."

Thus, by administrative fiat, even AFTER petitioners' half-hearted "administrative inventory" proved the computer was never processed as government property, -- like its desks but not their contents, and therefore belonged to the people if it did not belong to the state -- its owners are forbidden to use their own joint property for what they intended the computer to do when they decided together to buy it for their exclusive use.

Contributors and non-contributors were members of the Napa Alumni-Resident Association for continuing professional education and research and were discriminated against as such. How can owner-member-contributors to the training computer be legally denied the use of what they own and forbidden to

associate and peaceably assemble?

> In PRUNEYARD Shopping Center v. Robins, 447 U.S. 74 (1980), the Court declared that: "It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene other federal constitutional provisions."

A major purpose of the First Amendment is to advance knowledge and reveal truth -- this is its purifying quality:

> In WHITNEY v. California (1927) 274 U.S. 357,375, Justice Brandeis concurred that: "(T)he final end of the State (is) to make men free to develop their faculties."

> Nothing can with greater propriety be called a man's "property" than the fruit of his brain. WARING v. Dunlea, D.C.N.C., 26 F.Supp. 338,340.

IN SUM, "1-c" argues that the right of professionals peacably to assemble for the advancement of science and to petition for redress of grievances was seriously compromised by the idle speculation of an ex-con about what should buy training equipment, savings or taxes.

TWO

PEON'S EXPECTATION OF PERSONAL AND PROFESSIONAL PRIVACY IN HIS LOCKED WORK-AREAS AT HOME OR THE HOSPITAL WAS REASONABLE, HAD BEEN RESPECTED FOR ALMOST TWO DECADES AND COULD NOT HINDER WHAT PETITIONERS "OFFICIALLY" WANTED (TO SECURE TRAINING RECORDS)

(Respondent's Reply to Petition, p. 41)

IN SHORT, the "three personal items" claimed to have been work-related had to be stolen because they are not discoverable as relevant and are, in fact, not presented to this Court as evidence that the "administrative inventory" was what it was claimed to be. (See III:6 about fictitious sexual harassment complaint to justify "removal". C. 3.)

"Necessity alone, whether produced by danger or OTHERWISE, does not in itself make all non-probable search-

> es reasonable -- the equation must also take into account the likelihood that the search procedure will be effective and the degree and nature of intrusion into the privacy of the person and effects of the citizen which the search entails. U.S. v. SKIPWITH, 482 F2d 1272 (5th Cir. 1972). (Emphasis added. see also U.S. v. SPEIGHTS, 557 F.2d 362, 3d Cir. 1977.)

(d)

> Respondent's Private (1) Medical Files And (2) Personal Correspondence Were Inspected And His Employers Violated Confidentiality By Second Use Of Information Thereby GAined (r. 22-23). Const. Amend 4.

Dr. O'Connor in his April 27, 1983 deposition, A-51, admitted reviewing respondent's private patient files.

We may safely assume that the right of privacy extends to one's confidential financial affairs (esp. medical billings) as well as to the details of one's personal life (in decade-old memorabilia). VALLEY BANK v. Sup Ct (1975) 15 C3d 652,656, 125 CR 553,555.

Ex. xxi (r. 52): Medical files misused:

TO WHOM IT MAY CONCERN:

I declare under penalty of perjury . . .

In the fall of 1981, while Dr. Ortega was under investigation and before the hearing started, the Director of Crestwood Manor in Modesto, California asked me if I knew a Dr. Ortega who was being investigated for Medi-Cal fraud. He was on the phone at the time to someone who had just informed him of that. . .

Executed in Oakland, California on July 9, 1982.

s/East Bay M.D.

A federal law dating back to 1825 makes it a crime to take mail before delivery to the addressee with design to obstruct correspondence or "to pry into the business or secrets of another," or open, secrete, embezzle or destroy. (Dr. Ortega's union membership card was out of its envelop when brought to his door. Cf. Argument "2-h", also.)

It is obvious that protection is afforded against snooping, even though the mail is not opened. A "taking" need be no more than picking up a letter to examine it. Eavesdropping itself [even before the invention of the telephone for paperless communication before computerized, MODEM-mediated (r. 6), transmissions] has been recognized as a crime by common law for centuries.

II:100 discloses who gave consent in pawn's absence, without asking for power of attorney to dispose of anything that strikes the various investigators' gamut of fancies.

In WALTER v. United States (1980) 447 U.S. 649, misdelivered pornographic films were screened by both the receivers and the FBI. Nevertheless, the Court deemed the FBI's viewing of the films an impermissible "search" without a search warrant.

Under the Fourth Amendment, any object

from which one person has a right to exclude another, even though temporarily, is a candidate for protection. (Exclusion means sealing or keeping the key to lock others out.)

The Fourth Amendment applies to a search whenever the government participates in any significant way in it. USCA Const Amend 4.

> When search and not arrest is real object of officers entering upon one's premises and arrest is pretext for or at most incident to search, there is "unreasonable search". U.S. v. Kowal, D.C.R.I. 197 F. Supp. 401, 404. See also CHADWICK and SANDERS in Add.

A "search" must begin with a plan and can continue until expropriation of the object thereof. (But what does pawn's 10-year-old souvenirs as Exx. 17, 18 and 19 prove about his work a decade later?) The police can only take what appears likely to be the products or instruments

of crime. This limitation is as basic as protection against involuntary self-incrimination to which it is a close kin. (For sure, warrantless officials cannot seal personal property as "Evidence, Napa County Sherrif's Office". Ex. i-e.)

IN SUM, "2-d" argues that personal papers were expropriated without due process in order to insure eventual termination of a permanent public peon with help from pawn's private files.

(e)

Can Peons Be Punished Without Charges? (r. 20) Const. Amend. 5.

II:21 (r. 58) pin-points date of decision, without written charges until 4 weeks later, to dismiss before computer "disappeared":

> Dr. Ortega's secretary: Well, when I left on Wednesday at noon, whatever -- as far as I knew, you were on administrative leave, I believe.
>
> Dr. Ortega: Right.
> A: When I came back, I

understood that you had been dismissed.

Q: And that was what date?
A: That was on a Monday, I think.

Q: Monday of the day --
A: That the computer --

Q: -- that I told you the computer --
A: The morning you called and said you had the computer.

Q: And who said I was dismissed then?
A: Doroty (Dr. Ortega's executive secretary) had told me. Now, wait a minute. I had understood that through my husband (Mr. Friday's chief engineer).

Q: That I was dismissed?
A: That you had been dismissed because of this investigatio.

Q: On that Monday, I had already been dismissed?
A: Yes.

Dr. Ortega: Thank you.

That same morning, respondent received a hand-delivered extension of his administrative leave, effective that day, though back-dated to the very Friday

when his "vacation" was supposed to end, but no questions about the computer, probably because the court had already refused to issue an order to retrieve it.

BRYANT v. SPB (1950) 96 CA 2d 423, 215 P 2d 512:

> If notice is required, the complaint must state sufficient facts to show that the accused committed some type of prohibited conduct.

See also SKELLY v. S.P.B. (1975) 15 C2d 194 (Minimum pre-removal safeguards, r.20) in Appendix.

> An unconditional and peremptory dismissal is of itself a sufficient prevention of performance to entitle the employee to bring his action for breach of contract. WINSOR v. Silica Brick Co., 31 CA 85, 159 P 877; GREGG v. McDonald, 73 CA 748, 239 P 373:

The "administrative inventory" of respondent's locked files had already been completed, all that was left was to

carry out the formality of charging him as soon as witnesses can be found.

IN SUM, "2-e" argues that the die was cast no matter what.

(f)

Peon Was Presumed To Be Guilty Of Tardy Charges And Must Appeal To Get A Hearing, r. 21. Const. Amend. 6.

When extra-mural investigation turned up nothing, tardy CHARGES WERE PADDED and sexual harassment of supervisees of other supervisors were added.

No attempt was made to amend a 1972 "sexual harassment" charge in Notice of Punitive Action, 9/14/81 (I:10, App.) despite its obvious ex-post facto quality:

> State Personnel Board asked all state agencies (Ex. F) on March 20, 1981 to "distribute a copy of your departmental policy statement" on sexual harassment "by June 15, 1981" and "send a copy of the policy by June 15 to the Personnel Board's Women's Program Unit".

Instead, as an indication of the

bankruptcy of the other charges, the "complainant" was the first witness called! Hearing Officer tried hard to find an excuse to have Dr. Reynolds testify to stale charges! It took all of three pages of consultation between hearing officer and present counsel for SPB defending his decision at that hearing before they finally excused her from the stand.

I:8/14: "Recall" of witnesses promised:

> Hearing Officer: Certainly, you may recall any witness you want.
> Dr. Ortega: Okay.
>
> Hearing Officer: Proceed, Mr. Rubin.
> Mr. Rubin: Thank you. I'd like to call Dr. Elizabeth Reynolds.

. . .

I:11/3: She denied living out of town:

> Hearing Officer: Are you planning on leaving the area? What -- would you be available if your testimony became important to this issue to this case?
> Dr. Reynolds: Yes.

> Hearing Officer: And you do live right here in Napa?
> A: I do.
>
> Hearing Officer: I see no reason in view of the fact we're striking that particular allegation, she shouldn't be excused at this time.

If NAPA was richer in "complaints", hers would not be left unamended for being outside the statute of limitations even for rape.

In hearing officer's need to find any corroboration whatsoever for sexual harassment of Caucasians, which failed throughout the hearing, one can find confirmation of miscegenophobia (App48).

The charges were tardily drawn because there were none that could be proven.

How can inefficiency be proven when respondent's is the last post-graduate psychiatric training program accredited for four years in a California's State Hospitals? But what is there to lose by

trying?

Even at this late date, and without asking petitioners, or reflecting that inefficiency is self-correcting, their second attorney of record attempts to support a charge of inefficiency by speculation (PB 16) that pawn's office and files are bound to be his "citadels of inefficiency". (Cf. App208) He had NOT EFFICIENTLY reviewed the record:

Hearing officer's apology (III:74) about absence of specific allegations of efficiency was forced by preceding testimony by the Stanford University Chairman of Psychiatry about respondent's extraordinary accomplishments (III:70).

Cf. App. for late and new charges:

Another hastily drawn charge has been more hastily and even more tardily redrawn (PB 24, footnote 22). Virtually

outdoing the speculative ex-con (PB 24) and without consulting petitioners, their counsel alleges, on behalf of our speculative ex-con, that respondent was improperly charged by those who had been expertly conned:

No coercion was charged in the Notice of Punitive Action, ex-con admitted it was "pure speculation" and both Dr. O'Connor and Dr. Laskay denied hearing any complaint of coercion. Yet the "fact-finder"/hearing officer heard it somewhere, and repeated it in his Proposed Decision as a basis for dismissal! Cf. App.

> An order of an administrative board based upon incompetent hearsay evidence contravenes due process and cannot stand. ARMISTEAD v. City of L.A. (1957) 313 P2d 127, 152 CA2d 319.

IN SUM, "2-f" argues that what started out as (1) a simple "witch-hunt" by real parties of interest, has become over-extended as (2) an endurance test into

(3) a marathon "sorcerer's chase" for alien secrets of coercive and sexual staying powers.

(g)

Can Ex-Peon Be Made To Pay The Equivalent Of More Than $10,000.00 Bail (r. 4) Until His Dismissal Is Sustained By Refusing To Issue A Single Subpoena He Requests In Writing? Const. Amend. 5, 6, 7, 8, 10, 14.

The right to enjoy property without unlawful deprivation, no less than the right to speak or right to travel is, in truth a personal right, whether the property in question be welfare check . . . or saving." LYNCH v. Household Finance Corp., Conn. 1972, 92 SCt 1113, 405 US 538, 31 LEd2d 424, rehearing denied 92 SCt 1611, 409 US 911, 31 LEd2d 822, on remand 360 F Supp 720.

Pawn wrote to King on 24 April 1982:

"Dear Mike,

". . . You may feel fully entitled to withhold warrants for the price of keys. . . Without malice, the total ($11,128.95) would have earned much more than the indebtedness ($595) to our computer training consultant whose contract was not transmitted for the approval it promptly received the following fiscal year. Who is teaching science data processing now? . . .

Ex. i (r. 4): Copy to State Court:

"14 June 1982

"Dear Mike,

". . . If it turns out only non-whites are deprived of the use of such legitimate earnings ($11.128.95) . . . the issue will have been well raised.

"As you know, money has little attraction for me, and I expect even my alumni to sacrifice it for once-in-a-lifetime opportunities, as when I advised you to accept the post of Director of Mental Health at reduced salary.

"Sincerely yours,

"s/Magno (Ortega)"

Due process of law excludes all arbitrary dealings with persons or property and shuts out all interference not according to established principles of justice, one of which being the right and opportunity to cross-examine, to meet opposing evidence, and to oppose with evidence. In re BUCHMAN's ESTATE (1954) 267 P2d 73, 123 CA2d 546, 47 ALR2d 291.

V:96: Hearing Officer: Well, he testified pursuant to my direction. He's entitled --

But he soon changed his mind (V:111, r. 31): Dr. Ortega was not to be heard, even for purposes of cross-examination.

After surrendering (II:30) the approved computer training contract previously withheld (II:43/22) in violation (r. 8) of Gov't. Code Section 14780 (App6), allowing clarification of Dr. Vaughn's leave of absence memo, etc. (App145) during his attempt at cross-examination, Mr. Rubin declined further confrontation.

> "We may suggest that cross-examination, if successful, is the most effective method of rebuttal, and frequently does away with the necessity of producing other rebuttal evidence (at 916)." MASS. BOND. and Ins. Co. v. Industr. Acc. Comm. (1946) 74 CA2d 911 (at 913).

Without further testimony in open court, no further public hearing would ever recover respondent's reputation. Its destroyer cannot be reheard and re-

cross-examined after having been excused without an excuse, because Dr. Laskay died during the deposition of the investigators.

> 20 Am. Jur. (at p. 1043): "A party is entitled to call as many witnesses as he deems necessary to the establishment of his claim or defence, subject to the power of the court reasonably to limit the number who may be heard upon any one issue."

For earlier promises and denials of witnesses, in violation of G.C. Sec. 19581 (r. 28, PA-6), see I:8 (a. 10), II:143 (a. 25), IV:5 (a. 31), and V:91 (a. 14) in Appendix.

> Even the denial of right of cross-examination -- (as distinguished from the right to call adverse witnesses) -- may constitute denial of due process. SMITH v. SMITH (1954) 270 P2d 613, 125 CA2d 154.
>
> "Offers of proof before calling adverse witnesses is not required by law, whether as a class or as individuals" (TOSSMAN v. Newman, 37 Cal.2d 552, 233 Pac.2d 1; LAWLESS v. Calaway, 224 Cal.2d 81, 147 Pac.2d 604).

Yet offers of proof (e.g., r. 16) were demanded at every turn, despite the governing law in administrative adjudication of the department of developmental services (G.C. Sec. 11513b, App165).

And the proposed decision was not shared (in violation of G.C. Sec. 19582b, r. 35, PA-6) and it contained findings (App184-208) that had nothing to do with the charges alleged in the Notice of Punitive Action.

In GRAHAM v. Scissors Tail, Inc. (1981) 28 Cal.32 807, 17 Cal.Rptr. 604, the California Supreme Court held that a contract provision requiring arbitration of disputes

> " . . . was unconscionable and unenforceable because it designated an arbitrator who, by reason of his status and identity, was presumptively biased in favor of one party. . . (E)ither the court must appoint the arbitrator on petition of a party or the matter "should proceed to a determination of the controversy".

(See also TEX-CAL LAND v. ALRB, a. 8; AP-

PLEBAUM v. Bd.of Dir., a. 7.)

> The due process clause also guarantees that no punishment may be arbitrarily or capriciously applied. FURMAN v. Georgia, 408 US 238 (1972).

Dismissal (after pre-judicial and quasi-judicial due process violations) from a position held without written criticism for 17 years is capital punishment for a professional whose career is thus cut down in its prime. It is unusual punishment in the face of overwhelming evidence that his performance is meritorious and, in fact, peerless among Directors of Residency Training in public hospitals throughout California.

IN SUM, "2-g" argues that what started out as quasi-judicial increasingly became farcical, at great cost in money (withheld earnings as "bail" and future income as a professional).

(h)

Can The State Pressure Peon's Union

Representative To Withdraw Legal Assistance Because Member Happens To Be Both A Manager And An Employee? Const. Amend. 5, 10, 14.

State-Employed Physicians' Agenda on Sept. 19, 1981 was changed to include as (8) New business (Exhibit CC): (d) "Defense of management as members"; (e) Local handling of grievances, after union was notified that Dr. O'Connor will be a member of the state bargaining team. In fact, the new items of business (d) and (e) were moved up and discussed longer than any other. But it had already been decided, without consulting member, that union counsel would decide the merits of his case before proceeding further, which had never been done before, since all members are entitled to assistance without prejudgment. (Cf. App29: G.C. Sec. 3528 and Ex. U-2; and II:138, where

Dr. O'Connor denies union experience!)

IN SUM, "2-h" argues that, as in medical care, legal assistance is harder for the not-so-poor and union representation and private counsel must be denied a sorcerer with coercive and sexual tendencies.

(i)

Can The State, Once The Hearing Has Started, Search Ex-Peon's Papers Again For Non-Contraband Materials To Inhibit His Supporters? Exx. P and JJ-2. Const. Amend 1, 4, 5.

Petitioners claimed in their petition that a semi-nude photograph, self-composed valentine card and "standard book of poetry" were seized because they were work-related (C. 3). All respondent's personal effects were impounded (Ex. W below, r.23) and then searched again after the hearing had already begun (II:3, III:11). Three ten-year-old souvenirs were selected and used to threaten (Ex. JJ-2) use of Dr. Sutton's declaration (Exhibit P, a. 2) of Dr.

Ortega's well-known effectiveness as an educator. Superior Court ordered them produced (Ex. H). They were introduced as evidence to rebut Dr. Sutton's testimony, and accepted by Hearing Officer with some alacrity (III:91).

Cf. Respondent's and Petitioners' Consolidated Citations in Addendum.

IN SUM, "2-i" argues that no stone was left in place that can hide the target, no niches went unsearched for supporters, no avenues remained unblocked for pawn to escape unwounded.

(j)

How Long Can State Impound (Commandeer Without War Or Hot Pursuit) Peon's Private Files? Exx. W, X, Y. Const. Amend 4, 5. [j:1]

Sealed before respondent was dismissed with tapes which read in red letters, --

[j:1] Should strictures against official conduct be more loose when the victim only loses his professional career rather than a career in crime? If life inside prison walls is what makes the court hesitate to convict, why are many convicts recidivists?

"Evidence, Napa County Sheriff's Dept.", and marked "Personal Property of Dr. Ortega, Oct. 7, 1981" (Ex. i-e), hospital counsel denied petitioner's request to surrender them and suppress their presentation as "evidence" on Oct. 20, 1981.

Ex. W (r. 23) is not "inventory-taking"?

Personal property all non-contraband:

> "All of them are available for your inspection at the hospital. We must respectfully deny your request however that any of the documents be suppressed or returned to you."

Exx. X, Y (r. 22): All files impounded:

Ex. X: 10/14/81, Copy to State Court:

> ". . . (R)eturn . . . all personal and business files and correspondence with patients and other persons.
>
> "Going through them and keeping them was unreasonable, when there is no compelling public need to do so, and is in violation of federal and state constitutional standards. . ."

Ex. Y: 11/31/81, Copy to State Court

" . . . I demand that you immediately turn over to me all that is mine, my private papers and any copies you have made so far. . .

"Unless you do, I submit you are in violation of 42 USC 1983."

In U.S. v. PLACE (1983) 103 S Ct 2637, Justice O'Connor held that "90-minute detention of defendant's luggage was unreasonable, and the violation of Fourth Amendment rights was exacerbated by agent's failure to tell defendant where they were taking the luggage, how long they would keep it, and how they would return it to him.

3. TERRY principles are applicable to permit investigative seizures of personal property on the basis of reasonable, ARTICULABLE suspicion, premised on OBJECTIVE facts that the luggage contains contraband or evidence of a crime. (Emphasis added.)

The articulable suspicion -- first spread as rumor and then admitted under oath -- was forgery, but what was seized was not evidence of forgery or of any crime.

5. In applying TERRY principles to investigative detention of luggage, Court must

> balance the nature and quality of intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion.

Allegation of forgery cannot be supported by presentation in evidence of unsigned document (Ex. 15a-1, II:168-171 in Appendix) to prove that "forgetfulness", not forgery, prompted seizure of locked office and search of locked files.

Only what the state has condemned and then processed as its property becomes its own, to do with as it pleases, copying what is incriminating. Yet petitioners kept insisting, after civil suit was filed in federal court, on returning to Dr. Ortega 22 boxes marked "Personal Property, Box No. 1,2,3, etc., October 11, 1981", some of which are still sealed with the red tape of

"Evidence, Napa County Sheriff". [j:3]

Administratively speaking, only the desk had been processed as state property. Its contents could not be claimed as belonging to the hospital (any more than the cars around it). [k:5]

IN SUM, "2-j" argues that warrantless search was followed by wholesale confiscation without explanation.

--

[j:3] The seal was broken in some boxes where the inventory list corresponding to the number of the box suggested to overworked and understaffed counsel for Napa where to find rebuttal evidence against Dr. Sutton's declaration in the form of Dr. Onne's ten-year-old photograph as a model, a self-composed Valentine card of the same vintage, and an even older volume of classic love poems.

--

[k:5] Private employers (PB 13) keep better business inventories of their property, without hiding behind the skirts of their company position.

THREE

PETITIONERS' "ADMINISTRATIVE INVENTORY" WAS PREMATURE/UNNECESSARY/UNREASONABLE; INEFFICACIOUS/INTRUSIVE/INDECENT, AND VIOLATED CIVILIAN PROPERTY AND PRIVACY RIGHTS PROTECTED BY THE BILL OF RIGHTS

(Cf. Reply to their Petition, p. 55)

IN SHORT, beyond intrusion and expropriation, state action betrays gross disrespect for common decency.

(k)

Does A Peon Have No Right To Expect Respect, As Well As Respect For The Law, From Government Officials? Const. Amend. 4-6, 10, 14.

The crucial test is not whether one agrees but whether one offers reasons for actions materially affecting the interests of others.

Only those disposed to violate rules which the community is disposed to enforce (ex-cons) should become subjects

of careful scrutiny, never for security or the enhancement of position. Each "right" asserted by one person is a limitation on the freedom of another.

In the present instance, the need arose to protect the complainant's credibility from impeachment by destroying or rendering inaccessible the only report of ex-con's cheating during the residents' annual oral examinations by two salaried hospital staff who are not members of respondent's faculty. [k:4]

Ironically, the report that the investigators sought and then euphemistically referred to in federal court as "resident training record" was written --

[k:4] Petitioners' ignorance of the routine filing practices of respondent's department prompted the "administrative inventory" of personal files in a locked drawer in a locked desk in a locked second professional education office that respondent had occupied a third of his life.

and submitted by Dr. Vaughn's second examiner, Dr. Laskay himself, who did not know where such reports are filed.

The corollary question is "Would any of the Justices secretly, in the dead of night, inventory the personal correspondence of any clerk of theirs after eleven months in their employ without earning a reprimand?"

IN SUM, "3-k" argues that though invasion may not have been intended to extend to indecent limits, it quickly did and there's no reason such searches can be contained, given the temptation that seizes the sexually or socially curious.

(1)

Does A Public Employee Become A Public Personage Without Rights To Privacy? Const. Amend. 4,5,6,10,14.

If, as Thomas Jefferson discovered,

"the whole of government consists in the art of being honest,"

civil authorities must be more open to scrutiny than celebrities. Yet the whole exercise in this instance was to

work in secret, muddy the picture, omit important documents from the public record, and demand that respondent be more open to questioning and examination of his private life than the petitioners of their public acts.

In California, concern for inadequate legal protection of informational privacy prompted a 1972 amendment to the State Constitution guaranteeing the right of privacy. Cf. WHITE in Add.

The Court also found the new constitutional right contains a private right of action and held that it REQUIRES the government to establish a "compelling justification" for violating the right. (Emphasis added.)

Personal correspondents were called by phone throughout the United States to obtain leads, even if their letters in pawn's files, including those from

alumni, could not be "work related".

A minor may not refuse if the parent agrees to official intrusion, but no official, whether legally appointed or trained, can waive the right of another adult to privacy.

> In U.S. v. Blok, 88 US App DC 326, 188 F2d 1019, 1951, a supervisor's consent to search by local police of a government employee's desk was held invalid under the Fourth Amendment. (For details, see Add.)

Only a judge can order a search and only for specific contraband, and the search must be conducted without dalliance, and once made cannot later be resumed. A Deputy Attorney General cannot re-search, even with a warrant.

Second search of premises based on same warrant as previous search was "unreasonable search". STATE v. PINA, 383 P2d 167, 168.

Ex. JJ-2 (r. 26, a. 6): Is this immune?

"Oct. 30, 1981 (1st day after hearing):

> "If you intend to introduce that document we will be compelled to offer rebuttal evidence which is in our possession. . . (We) have been unable to ascertain which documents will be needed to counter Dr. Sut-

ton's declaration (Ex. P., Cf. Argument "f" below). . . (W)e are hereby informing you that we do have relevant evidence bearing on Dr. Sutton's credibility and we do intend to use it should it be necessary. Finally, if you do introduce the declaration of Dr. Sutton, please so inform us by telephone so that we can subpoena her for cross-examination.

"s/Asher Rubin, Deputy Atty. Gen."

III:90-92: Souvenirs for "rebuttal"!

Mr. Rubin: Did you have sexual intercourse with (Dr. Ortega)?
Dr. Sutton: No, I never did.
. . .
Q: Did he ever kiss you?
A: Yes.

Q: Has he ever embraced you?
A: Yes, but not in a sexual fashion, in an affectionate fashion, almost the way you might kiss a child.

Q: All right. Is this a photograph of you?
A: Yes, that is. That was taken in a photo studio by a professional photographer.
. . .
Mr. Rubin: I'd like to introduce this as our next exhibit.
Dr. Ortega: Objection.

Hearing Officer Waller: Well, there again, it has very limited

> relevance, but as long as we are off on this tangent, it will be marked Exhibit 17, and it will be admitted.
>
> . . .

This cross-examination is continued in App169-170. See also G.C. 6254, 11180.5 and 11183.

> Justice Clark summarized, "(O)nce the right to privacy was enforceable against the states, the Court could "no longer permit that right to remain an empty promise . . . to be revocable at the whim of any . . . who . . . chooses to suspend its enjoyment. . ."

In GILLARD (cited in their opinion by the Court of Appeals panel that decided respondent was even more grieviously damaged than Gillard),

> the Court held that a school guidance counselor's locked desk and locked office were protected by the Fourth Amendment from warrantless search by other employees. (The counselor had manifested his desire to protect confidential notes profiling his counselee's psychological problems from "prying eyes" by locking up his desk and office.)

Other precedents that may be cited are also listed in Add., for comparison with petitioners' selected citations:

In BIVENS, Chief Justice Burger suggested that civil suits for offending officers might be a plausible alternative (e.g., to MAPP).

Petitioners' own citations do concur

(omitted parts literally in Add.)

IN SUM, "3-1" argues that no reasonably decent man will find secret search and seizure and storage and use against the owner of the tainted fruits of official warrantless intrusion reasonable by any standards cited in any precedent by a whole army of lawyers for the state.

(m)

Is There A Limit To The Number Of Laws Non-Military Officers Can Violate With Impunity? (r. 8, 22-23, 28, 30, 35, 51, 53; a. -16, -17, -37.) Const. Amend. 1, 4-7, 9-10, 14. Cf. Add. for list of violations and omissions.

Justice is the fairness with which benefits and burdens are assumed.

The official record proves a concerted effort to kill a career. The State understandably wishes there was a double standard of disclosure between employees and employers of their state. Pawn is

confident the Court does not, shall not, will not, agree to legitimize such a caste system of access to information.

IN SUM, "3-n" argues that a government of law does not allow government men to break the law regardless of their position in government.

(o)

Does Power Corrupt The Immune And Can Qualified Immunity Corrupt The Qualified? (a. 6). [o:1]

The Court will have to decide if petitioners denied the rights of persons ("p" to "z") by their official conduct and will again deny, under color of of--

[o:1] The first to claim legal immunity were fathers-owners of households for their conduct with citizens under their own roof. The second were the clergy in whose churches they insisted on sanctuary for their flock. The third were embassies who claim artificial sovereignty for the premises they occupy. The fourth are lawyers who have been granted absolute immunity as prosecutors or judges, but only for their behavior in court. Then came consenting adults for private conduct. And now, employers who claim they can do as they please with citizens under their employ.

fice, any person any of these rights:

p) to adverse information [o:2],

q) to unalienated affection,

r) to assemble with others,

s) to work until proven incompetent,

t) to use spend their money as they wish,

u) to presumption of innocence vs. doubts,

v) to be secure from all surveillance,

w) to proper investigative procedures,

w) to dependable redress of grievances

y) to access to impartial tribunals, and

z) to equal protection under the law.

Which of these personal rights, when they were clerks, are the Justices of this court and of all the courts below willing for love of the state to forego without an enemy without or for those

--

[o:2] Even "p" (the right to adverse information) does not require immunity against slander or libel for State hatchet men, if they were forthcoming and offended victim dared to sue, since the State is not spreading ugly rumors.

outside prison walls?

Does what a person, peon or not, leave in government property that does not belong to the state give its custodians the right to be privy to it, or that government officials can share what is there in secret, or with the public when it suits them? [o:3]

IN SUM, "3-o" argues that sovereign immunity when shared with agents of God or government was intended to preserve their own privacy, not by secretly violating that of another's by perverting public trust. (Only private perversions with mutual consent are legally immune, even if lethally contagious.)

--

[o:3] If petitioners did not feel above the law, or if they were not convinced the law had set them above ordinary citizens, would they have been so secretive and, when found out, because they were also indiscreet or boastful or both, so proud to claim qualified immunity for their actions as government officials as not to offer even a token apology for invading a person's privacy?

RESERVATIONS

It is curious that computer-resistant petitioners now come for permission to the Supreme Court to conduct secret administrative inventories when current technology render such procedures effortless and untraceable. Can the Constitution encourage computer literacy without idling bureaucracies or penalizing technocracies? [R:1]

Only the sub-purchase of additional video and training computer accessories were submitted for approval, and their purchase orders were signed by a duly constituted authority. Therefore no unauthorized purchases were made but even the approved purchase orders were --

[R:1] Bureaucracies tend to frown on individual initiative, and unusual resourcefulness is viewed as deviation. But post-graduate education in a public hospital cannot wait indefinitely for teaching equipment to be bought by taxpayers.

not honored, after signatory forgot he signed them.

In the dawning of space age technology, the video equipment (another monitor for which was included in the sub-purchase orders) and the training computer aboard the "post-graduate space shuttle" were not paid for by a paper-bound bureaucracy, but by private donors. Only the computer was bought with space age commuters' money. [R:2]

SUMMARY

1) As "statesmen", can we only see the --

[R:2] Some passengers developed "space sickness" and one was returned briefly to earth. Dr. Vaughn was to resume his journey of exploration after a month's L.O.A. (He did, on schedule, starting August 1, 1981). On earth while still sick, he was asked to speculate as to why he was not reaping the rewards of exploration of expanding space. He said it was because he did not contribute to the cost of the computer aboard. (Yet he was never invited to contribute, because he was a penny-pincher, and other non-contributors were on board.)

ship of state as critically leaking and slowly sinking all the time because of ever-present saboteurs on board?

2) Or, can we see ourselves as "villagers" living closely together on earth but in separate cottages, without feeling crowded out of the community by fences separating individual clans (professional guilds) or extended families (bureaus or or agencies).

3) Or, as "spacemen", can we see ourselves orbiting out yonder around each other with the assistance of technical instruments we must learn to use if we are going to be masters of space in real time, not later?

QUESTIONS BEFORE CONCLUSIONS

Was the State running scared in their haste to investigate without a warrant? Or were they afraid the judge would frown on their reasons for searching?

Is their fear a sign that the State is weakening in relation to the judiciary, and are now crying for injections of artifial immunity to increase their resistance to a creeping affliction of miscegenophobia? Is this Court their doctor or their judge? Is the government sick or its employees biased? [Q:1]

In still uncritical times, how many Justices are willing to say "No" when --

[Q:1] Miscegenophobia combined with fear of machine substitutes among paper-fed bureaucrats can fight back by sponsoring a marathon sorcerer's chase to run down or aground any source of envied or dreaded sex and electronics. These marathons may well become a regular feature of employment with more foreign rivals and better artificial intelligence. Male aliens are now competing where more Caucasian females find both increased self-esteem and a source of income. Both threaten computer illiterates who have only their natural wits to help them fight technocrats. Racist sexism coupled with compu-phobia can replace our class wars with a two-tiered caste system of biased bureaucrats and better technocrats.

the trespass of liberty becomes sufficiently blatant among those who suffer from a sieged garrison mentality? [Q:2]

The penultimate question left to be answered is "WHY NOW?" Dr. O'Connor had been told by Dr. Laskay during the annual examination of all residents that Dr. Vaughn had cheated and that he had reported it in writing to Dr. Ortega. If Dr. Laskay also told Mr. Friday about it, the report of the cheating must not be available to reduce Dr. Vaughn's cre-

--

[Q:2] Does God or government bless liberty? Or must people fight for it?

Animals guarantee autonomy to each other within limitations that are not questioned except briefly in mock combat, unless it is a matter of food or sex. We call it instinctive territoriality. Only in man does it become educated imperialism, religious or evangelical, local or political, multinational or economic. (None of above imperialists are actually starving, no one but Hinckley has attempted regicide for sexual reasons.)

dibility. Their only mistake is to suspect that Dr. Ortega locked residency training reports in his office, when in fact his secretaries filed them in their own locked filing cabinets. But once Dr. Ortega's personal correspondence was accessible for inspection, there was no stopping the investigators looking for what may be incriminating, to hide their mistakes. [Q:3]

The final question is WHEN did petitioners decide which papers were work-related and may be inventoried (and

--

[Q:3] Hard-workers cheat because they want to do well, not because they are bad. (If they are found to be greedy in the past and had been convicted of fraud, it is because they had been raised and taught to be selfish. Ex-con is a rabid Ayn Rand's fan, in prison or out, predictably -- for one can be ignorant but never inauthentic -- preaching rational self-interest to his fellow residents without much success: they are slightly ahead of him in their post-logical moral development).]

then seized for blackmail purposes)? Answer: After the hearing had already started! (II:3/10.) [Q:4]

CONCLUSION

I. First: forced entry was furtive. [C:1]

Such secrecy is suspect when it yields and takes control of a tantalizing --

[Q:4] The court ordered them produced as well as all other material gathered during the investigation. (Ex. H).

Thus, Exhibits 17-19 which were STOLEN from respondent were NOT RELEVANT until after the investigation was over. They were claimed by petitioners to be, but were not in fact, work-related, and therefore were not included in the appendix with their petition or even mentioned in their brief on its merits. They were discovered only after the court ordered that they be produced (Exhibit H) along with sub-purchase orders that were testified to but not presented as exhibits that first day hearing to prove pawn must be punished. --

[C:1] Nocturnal raid by Mr. Friday, p. 26 of his federal deposition (r. 50, A-54) cannot be countenanced as oversight "to maintain access to government records" (PB 8, footnote 5).

souvenir, even given California's sexually liberated climate of omnivorous curiosity, which encourages but does not immunize voyeurs. [C:2]

II. Second: furtive entry invented abortive inventory. [C:3]

III. Third: respondent's office was seized and his property impounded, in

--

[C:2] Search was originally intended to seize a report of cheating by the ex-con -- during the recently completed annual examination of all residents -- which would cast doubt on the veracity of his speculation of coercion (which was unquestionably denied by all contributors to their training computer anyway, without impeaching him over an error of judgment: he passed a repeat exam quite easily).

--

[C:3] Why should citizens pay the government for inventing an inventory it does not know how to conduct and gives up almost as soon as it is started (PB 8, footnote 5) without B.L.C. (legal cost/benefit bottom-line-consciousness of ANNUAL budget movements to cover PENDENT state claims)? Emphasis originally added for the congnoscente.

the course of a sorcerer's chase for secret sexual and coercive powers called an "administrative investigation" into respondent's work-distant activity.

IV. Fourth: this uncalled for sequence of state action gives rise to 42 U.S.C. Sec. 1983 liability, as the Fourteenth Amendment is infringed thereby.

RECOMMENDATIONS, REMEDIAL SUGGESTIONS

A. Can petitioners be forgiven their past mistakes, but the state ordered to make immediate restitution for the actual damages it allowed them to inflict, and to pay punitive damages to be decided by a jury, to dissuade future abuses?

B. To prevent future inadvertence by petitioners themselves, can they share paying the interest on actual damages, to save taxpayers the additional burden, and all of the taxes due thereto, out of their last salary increments or savings,

at a rate to be decided by a jury?

C. Since the legal requirements for placing an employee, permanent or not, for two weeks or less or indefinitely, had never been met, can the Court correct all past reversible errors by declaring such extreme measure to conduct an invented and aborted "administrative inventory" illegal and void, thereby reinstating respondent to status quo ante?

[Appended in Addendum are citations from the statutes and regulations, policies and practices, and rules and precedents that govern acceptable official behavior.

[Counsel had been invited repeatedly in writing to dispute prejudices imputed to petitioners, for which immunity is sought from this Court. Can continued silence be deccded "No contest"? Cf. Appendix.]

Respectfully submitted,

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ERRATA

As in the Appendix ('a') to the Reply ('r') to the Petition for Writ of Certiorari ('C'), this Addendum (Add.) to Respondent's Brief (RB) will first deal with what is easily disposed of in Petitioners' Brief (PB) and in the U.S. brief on behalf of a reversed decision.

In 'C', there was the "essential lie" (a. 1) about Exhibits 17, 18, 19 that were impounded as "relevant to the pending personnel investigation against respondent" (C. 3). Happily, such assertion is not repeated in PB.

But both PB and the brief for the U.S. (US) are replete with errors which are not necessarily lies unless they are repeated in reply to RB.

Errors may merely be from accidental misinformation or they may be wishful disinformation (Cf. No.34, this list).

Appended is available documentation for the corrections of most of the errors in both briefs which echo each other:

1) PB 3, US 11: No resident had ever complained of sexual harassment. The only harassment investigated was that of an alumna (Dr. Reynolds, III:7,21) who graduated ten years before. (Dr. Laskay, who had been her supervisee when he was a resident, asked her to write a letter about what he heard had happened before he came.)

2) PB 4, US 11: Indefinite administrative leave order (Ex. S) was dated Friday, August 14, 1981, and could not have been received before the week-end. It was in fact sent to the wrong federal post-office box on the grounds which was still off-limits to respondent, to his office in the hospital, which was still

off-limits, and then finally hand-delivered by an administrative trainee, Mr. Arnold, one of the amateur investigators, before noon on August 17, 1981, effective that day, and after the computer had been reported as "missing property" (Ex. 10), not "stolen", nor as "hospital property".

3) PB 4: There were no resident files in Dr. Ortega's office. They are all filed by the secretaries in their locked cabinets. The "female medical resident" (Joyce Onne) whose correspondence was stolen was an alumna (Dr. Sutton), who was Dr. O'Connor's chief resident in their graduating class ten years before.

4) PB 4: Dr. O'Connor would never accuse his teacher of theft.

5) PB 4: The lock to Dr. Ortega's office was changed before 0800 hours on Friday, July 31, 1981 (Ex. T-2), and its

contents were never inventoried. A-57.

6) PB 4: The necessity to secure the office which did not contain the computer is like closing the barn door after the cows have gone to pasture.

7) PB 4, US 3: The search did not secure any state property. In fact, all the contents of Dr. Ortega's office were returned to him after it had been searched several times (Ex. JJ-2), some copies made (Atty. Wainwright's letter to Judge Vukasin, A-62), and some souvenirs stolen (Exx. 17, 18, 19).

8) PB 4: The contents were not removed so that the office could be used by another employee (Announcement by Dr. O'Connor: Dr. Jeffress was recruited by Dr. Ortega and continued to occupy the office adjoining his even after the announcement.)

9) PB 5: The degree of intrusion was not

minimized by returning respondent's personal effects, which were refused even after the hearing had started (Exx. JJ-2, X, Y).

10) PB 5, US 3,10: Dr. Ortega had the only key except the janitors, who also had the key to the new lock (as did Mr. Friday, p. 26 of his deposition, A-54) to use after hours. Cf. KAHAN, A-29.

11) PB 6, US 3: The search, seizure, storage and stealing of ten-year-old souvenirs (Exx. 17, 18, 19) are not necessary or reasonable, even in private business. They are not concerned with "work-related activity".

12) PB 8, US 3: The items in the office were taken to an investigator's office (Mr. Stratton's deposition, p. 59) and some moved to an "evidence locker" (p. 60). All were kept after respondent demanded their return. Exx. W,X,Y.

13) PB 10, US 11: The prerogative to remove government employees whose conduct hinders efficient operation and to do so with dispatch is governed in California by Govt. Code 19574.5 which specifies which conduct warrants immediate exclusion, and does not apply to respondent.

14) PB 13: Benefactors may not enter welfare beneficiaries home without advance notice (Cf. WYMAN, A-32).

15) PB 14, UA 12: Service to the public is enhanced by the predictability of the institution. In fact, an unpredictable group of services cannot be institutionalized. So must institutional predictability characterize its behavior towards its employees, or they cannot function. They must be told they are going to be intruded upon in order to accommodate to such interruptions:

PB 5 "on general inspection policy", US 4 on office inventories being "reserved to employees who were departing or were terminated".

16) PB 16: Access to offices does not include impounding its contents.

17) PB 16, US 17,19,21: Expropriation of personal memorabilia is not as common as borrowing a paper clip or a pencil (US 7) or a book (US 11).

18) US 6, 15, 17: Search was made for forged documents, Dr. O'Connor having forgotten that he signed one of them.

19) US 6: Petitioners also wanted to locate a report of cheating by the resident who complained his fellow residents were coerced to get a computer (it was actually their idea).

20) US 7, 9: The private patient files were in order to supplement the loss of mental patients for teaching when Napa

was transferred to the Department of Developmental Services to look after the developmentally retarded.

21) US 9: IBM files were also for training, before computers got cheaper.

22) US 9: Respondent's assertions are documented herewith from noticed administrative proceedings.

23) PB 16: No search for the sake of oversight is ever allowed unless it is routine practice.

24) PB 20: Prior recognition of institutional deficiency resulting in demonstrable damage dictates changes in policy, not ad hoc decisions to search.

25) PB 24: Non-naturalized citizens may get away with ignorance of the American Bill of Rights, but not aliens.

26) PB 24, US 11: Petitioners never lodged a prior grievance against respondent or else they are derelict in

reporting their legitimate concerns regarding his work-related conduct in mandatory performance reports.

27) PB 24, US 11: Coercion was denied by all residents, including complainant who acknowledged it was "pure speculation" (I:58, 98) and by Dr. O'Connor (II:103) and Dr. Laskay (III:9). Was hearing officer hearing other voices?

28) US 3: Overtime "work" must be training-related or "workers" will complain to EEOC for being exploited at work; the curriculum is entirely respondent's responsibility, and he is accountable to its contents only to a national accrediting body. His trainees are not paid by Napa, but are supported out of separate budgets of different state agencies and from federal or other sources, including family savings.

30) US 2: Dr. O'Connor testified he did

not even remember signing some of the papers on the same day (II:62). He never checked whether he misheard or misremembered.

31) US 2: The computer training consultant contract (Ex. 16b) was approved on July 15, 1981, "effective immediately" (GC 14780) before respondent was placed on administrative leave!

32) PB 24, US 2,3: Complaints of "sexual harassment" were made by undergraduates who were never respondent's supervisees (all postgraduate trainees specializing in psychiatry), both of whom had already left the hospital when they complained after respondent had already been dismissed. (I:25, 39).

33) PB 24: The resident who complained someone may have felt coerced to contribute was placed on LOA, not AL, because he no longer had sick leave left

but still wanted to delay resuming interrupted rotation for one month (App142). A month's L.O.A. without pay is the maximum SPB Rule 361a allows:

> "An appointing power may grant leave of absence without pay to an employee for a period not to exceed 30 calendar days" under S.P.B. 361b: ". . . 4) for illness . . . or 5) for some other reason equally satisfactory as determined by the appointing power."

See also SPB hearing officer's stand on these old existing arrangements, I:69. Attorneys of record in their "citadels of efficiency" (App211) should more efficiently inventory their record before including any new charges under the wrong code provisions in their briefs. (PB 16's speculative charge of "inefficiency" had also already been dismissed by the hearing officer, III:74.) US 11, 12.

34) US 21: See US 2 about where the

computer was kept. Why the careless error? Are computers mobile robots?

With facts, arguments would not just be opinion but a question of digestion.

STATE AND FEDERAL PRECEDENTS VIOLATED:

IGNORED IN PETITIONERS' CITED CASES:

[What follows may not exactly counter all petitioners' cited claims, but the same source qualifies each of them enough to blunt the final point of their argument to mislead the Court to legislate what the California legislature cannot, after the people by referendum in 1972 amended their Constitution to protect their privacy:

[Civil Code Section 1798.1: The Legislature declares that the right to privacy is a personal and fundamental right protected by Section 1 of Article 1 of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy of information pertaining to them.]

i) Mancusi v. DeForte (1968) 392 U.S. 364:

1. Fourth Amendment provision against unreasonable searches does not shield only those who have title to the searched premises.

2. Capacity to claim protection of Fourth Amendment provision against unreasonable searches and seizures depends not upon property rights in invaded area but upon whether area was one in which there was reasonable expectation of freedom from governmental intrusion. U.S.C.A. Const. Amend. 4.

6. (Even) state officials' possession of a district attorney's subpoena duces tecum calling on union to produce certain books and records did not bring warrantless search of union office within exception to rule that search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. U.S.C.A. Const. Amend. 4.

ii) Marshall v. Barlow's, Inc. (1978) 436 U.S. 307:

2. Exception from search warrant for . . . liquor and firearms . . . is the exception, not the rule.

6. Reasonableness of warrantless search depends upon specific enforcement needs and privacy guarantees of each regulatory statute.

7. Incremental protections . . . are not so marginal that they fail to justify administrative burdens that may be entailed . . . (W)arrant provides assurance from neutral officer that inspection is reasonable under the Constitution, is author-

ized by statute, and is pursuant to administrative plan containing specific neutral criteria, as well ad advising owner of scope and objects of search beyond which limits inspector is not expected to proceed. U.S.C.A. Const. Amend. 4.

iii) Martinez v. California (1980) 444 U.S.227:

Parolee-murderer was not an agent of the California Parole Board. (This decision denied his victim damages, and is cited to deny California's liability in the present case, by fanciful legal somersault.)

iv) Michigan v. Tyler (1978) 436 U.S. 499:

4. Warrantless search of burned premises cannot be justified on ground of abandonment by arson until arson has been proved, and conviction cannot be used ex post facto to validate introduction of evidence used to secure same conviction. U.S.C.A. Const. Amend. 4.

5. Search for administrative papers, like search for evidence of crime, are encompassed by Fourth Amendment.

8) To secure warrant to investigate cause of fire, officialmust show more than bare fact that fire has occurred.

In the present instance, search

prompted by complaint of coercion to rescue complainant from impeachment by destroying report of his cheating, did not even result in charge of coercion.

19. . . . (N)umber of prior entries, scope of search, time of day when proposed to be made, lapse of time since fire . . . might all be relevant factors, and magistrate can perform important function of preventing harassment by keeping . . . invasion to a minimum. U.S.C.A. Const. Amend. 4.

No magistrate would find petitioner Friday's nocturnal search "reasonable". (His deposition, p. 26, A-54).

23. Failure to present federal question in conformance with state procedure constitutes adequate and independent grounds of decision barring review in U.S. Supreme Court, so long as state has legitimate interest in enforcing its procedural rule.

State has no policy to safeguard employees from "official fishing expeditions", nor has it tried to limit its scope, but asks the Court for blanket permission to search, secretly

or otherwise.

v) Mitchum v. Foster (1972) 407 US 225:

3. There is a fundamental policy against federal interference with state criminal prosecution. 28 U.S.C.A. 2283.

6. Only in case of proven harassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances when irreparable injury can be shown is federeal injunctive relief aginst pending state prosecutions appropriate. 28 U.S.C.A. 2283.

8. Other "implied" exceptions to blanket prohibition of anti-injunction statute are recognized . . . permitting a federal court to enjoin relitigation in a state court of issue already decided in federal litigation. . .

11. Provision of Civil Rights Act authorizing a suit in equity to redress deprivation under color of state lasw of any rights, privileges, or immunities secure by Constitution was intended to enforce provisions of Fourteenth Amendment against state action, whether that action be executive, legislative, or judicial. 42 U.S.C.A. Sec. 1983; U.S.C.A. Const. Amend. 14.

12. Congress . . . was concerned that

state instrumentalities could not protect those rigts; it realized that state officers might, in fact, be antisympathetic to validation of those rights.

Hea ing Officer himself applauded (II:169) "fishing expedition" for forgeries and other evidence of wrongdoing!

13. Purpose . . is to interpose federal courts between the states and the people, as guardians of the people's federal rights and to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or federal. 42 U.S.C.A. 1983.

vi) Butz v. Economou (1978) 438 U.S. 478:

7) All individuals are subject to federal law. Officials must bear the burden of showing that public policy requires exemptions of that scope.

8) This burden, when discharged, entitles them to qualified immunity, except where it is demonstrated that absolute immunity is essential for the conduct of public business.

13) Agency officials who perform certain functions analogous to those of a prosecutor and who are

responsible for the decision to initiate or continue a proceeding, subject to agency adjudication, are entitled to absolute immunity.

vii) Chenkin v. Bellevue Hosp. Ctr. N.Y.C. ETC. (S.D. New York 1979) 479 F.Supp. 1349:

1) Does the person claim a reasonable or a legitimate expectation of privacy that has been invaded by government action? Did the individual's conduct evince an actual, subjective expectation of privacy? Is that expectation, when viewed objectively, justified under the circumstances?

4) Three factors are crucial to weigh private vs. public interest under the Fourth Amendment: (1) strength of public necessity for the search, (2) efficacy of the search, and (3) degree and nature of intrusion upon the individual.

viii) Chocallo v. Bureau of Hearings and Appeals, SSA (E.D. Pa. 1982) 548 F. Supp. 1349:

19) When sole purpose of search of offices was work-related and reasonably forseeable by plaintiff who had refused active efforts of her supervisor to locate and remove case file, which was government property, . . . two administrative law judges . . . entering and searching former administrative law judge's office to obtain file did not amount to vio-

lation of former law judge's Fourth Amendment rights. U.S.C.A. Const. Amend. 4.

24) When director communicated to plaintiff the basis for non-promotion was discipline-related, director had authority to recommend adverse action for plaintiff's actions which were deliberate impediments to execution of delegated authority, although director erred in not processing plaintiff's promotion or grade increase.

25) Where plaintiff defied lawful directions, she assumed risk of adverse action for deliberate insubordination, and was not harassed and retaliated against for exercising independent action.

26) When plaintiff did not indicate what documents, if any, were improperly collected and disseminated, nor indicate manner in which defendants collected such data, complaint of violations of Privacy Act that were not relevant and necessary . . . was subject to denial.

29) Any liability for violation of Privacy Act rests only upon agency and not individuals.

ix) Williams v. Collins (8th Cir. 1984) 728 F.2d 721:

10) Defendants were entitled to absolute immunity only for common-law liability for defamation, search

(not seizure, Exx. 17-19) reasonably calculated to help investigation or simple inventory of material was within line of duty and defendant's had duty to investigate and remove employee if necessary.

x) Harlow v. Fitzgerald (1982) 457 U.S. 800

4) Under "functional" approach to immunity, immunity of government officials extends no further than its justification warrants.

8) Qualified or "good faith" immunity is affirmative defense that must be pleaded by defendants.

xi) United States v. Collins (2nd Cir. 1965, not 1963) 349 F.2d 863:

9) Room in which defendant's jacket was hung was his supervisor's outer office, which was public area not shown to be segregated for private purposes from other work areas.

xii) Camara v. Municipal Court (1967), 387 U.S. 523:

5. When right of privacy must reasonably yield to right of search is, as a rule to be decided by judicial officer, not by policeman or government enforcement agency. U.S.C.A. Const. Amend. 4.

7. In determining whether public interest demands creation of general exception to warrant requirement of

Fourth Amendment, question is not whether public interest justifies type of search in question, but whether authority to search should be evidenced by court, which in turn depends in part upon whether burden of obtaining warrant is likely to frustrate governmental purpose behind search.

8. . . . Searches, when authorized and conducted without warrant procedure, lack traditional safeguards which Fourth Amendment guarantees to individuals; overruling FRANK v. State of Maryland, 359 US 360, 79 SCt 804, to extent that it sanctioned warrantless inspections. U.S.C.A. Const. Amend. 4.

10. In case in which Fourth Amendment requires that search warrant be obtained, probable cause is standard by which particular decision to search is tested against constitutional mandate of reasonableness. U.S.C.A. Const. Amend. 4.

14. Search warrant procedure is designed to guarantee that decision to search private property is justified by reasonable government interest, but reasonableness is ultimate standard, and if valid public interest justifies intrusion contemplated, there is probable cause to issue SUITABLY RESTRICTED search warrant. (Emphasis added.)

[10] . . . To apply this standard, it is obviously necessary first to

focus upon the government interest which allegedly justifies intrusion upon the constitutionally protected.

When the justification changes from search for forged documents to securing government property (training computer was claimed to be donated without being processed) to collecting training records (kept outside locked office) to sorting private papers from public documents (and then packing everything in the locked office and storing them for future search of instruments to intimidate a witness against the state with her professional photograph and personal correspondence), allegations do not try to justify but attempt to excuse misconduct.

xiii) Allen v. City of Marietta (N.D. Ga. 1985) 601 F. Supp. 482:

> "This is not the case when an office supervisor or fellow employee is looking for some needed document or record and inadvertently happens

> upon incriminating evidence in the desk or wastepaper basket of another employee. Nor is it a situation where a supervisor is inspecting the area used by a subordinate in order to examine his work or to evaluate his performance on the job."

Chief petitioner, whom Dr. Ortega trained, is his nominal supervisor, had never evaluated his performance, and had been accused of "rubber-stamping" whatever he is given. Dr. Ortega, on the other hand, kept getting meritorious salary increases annually for 17 years without a single grievance against him.

No employee should be investigated by a fellow employee (co-petitioner Friday) against whom he had lodged a grievance (also the first time in 17 years). The right to an impartial decision-making process, unbiased by biased reports, is required by due process.

Permanent employees have property rights to their tenured position and

statutory expectancy that they will not be removed other than for "such cause as will promote the efficiency of the service".

> "Employment is one of the greatest, if not the greatest, benefit that governments offer in modern day life" Roth, 408 U.S. at 589, 92 SCt at 2715.

Dismissal from public employment for cause may also implicate liberty interests in imposing on the discharged employee a stigma of incompetence or wrongdoing that forecloses "his freedom to take advantage of other employment opportunities". Id at 573, 2702.

For the hearing to be meaningful (as distinguished from being conducted fairly, which appended "Nature of Controversy" clearly controvert), the decision-maker must be independent and unbiased.

"6. A government employee's supervis-

> ors might legitimately search her desk or her locker or her jacket where purpose of such is not to gather evidence of a crime unrelated to the employee's performance of her duties but is, rather, undertaken for the proprietary purpose of preventing future damage to the agency's ability to discharge effectively its statutory responsibility and employee cannot claim legitimate expectation of privacy from searches of that nature. . .
>
> IIIB. In government employment, such exceptions involve "a balancing of the individual's expectation of privacy against the government's right as an employer (as opposed to the government's right as a law enforcer) to investigate employee's misconduct which is DIRECTLY relevant to the employer's performance of his duties and the government's performance of its statutory responsibilities. (Emphasis added.)

Petitioners' claim that the "three personal items involving a female medical resident (Dr. Onne, a. 1) were removed as relevant to the pending personnel investigation against the respondent (Dr. Ortega)" was given the lie by their own state counsel who

offered, in defense of incomplete discovery [II:3/10], that he (Mr. Rubin) "volunteered to present to Dr. Ortega some additional materials which have become relevant, only as a result of the first hearing, when he handed me some statement of a former staff member of the hospital" (Dr. Sutton).

xiv) U.S. v. Kahan, 350 F.Supp. 784 (S.D.N.Y. 1972, rev'd 415 US 239, 94 SCt 1179), 39 L.Ed.2d 297 (1974):

> Even an employee's wastebasket is protected by the Fourth Amendment if the "criminal investigator's express purpose in rummaging through the wastepaper basket was to obtain evidence which could be used to prove the defendant guilty of a crime". Id. at 791. (Cf. r. 17 and [II:167/20 - 171/7].)

5. When a government supervisor begins an investigation of suspected criminal activities by an employee in course of his work, supervisor's role is no longer that of a manager of an office, but that of a criminal investigator for Government, in that purpose of surveillance is no longer simply to preserve efficiency in office but is specifically designed to prepare a criminal prosecution

against employee, and, in that case, searches and seizures by supervisor or by other government agents are governed by Fourth Amendment admonition that a warrant be obtained in absence of exigent circumstances.

12. Both direct and third party consent may justify searches which would otherwise be extremely unreasonable, either because they are conducted on mere suspicion or less or because they are extensive and exploratory in nature. U.S.C.A. Const. Amend. 4.

14. The only exception to the warrant request should be for searches and seizures which are reasonable because they are the result of exigent circumstances which compel a government agent to act swiftly and which makes their application for a warrant not reasonably practicable.

Petitioners were refused a court order to take back the computer to the hospital, but could have obtained a search warrant for respondent's office, if they suspected Dr. Ortega of criminal wrongdoing because he took the computer. Or they could have asked him for the training records they claimed they

wanted to secure against loss. App212.

15. Once it is determined that claimant has been subjected to a search or seizure which intruded on privacy which he could reasonably expect under circumstances, Government should be made to prove either that a valid warrant was obtained prior thereto or that exigent circumstances necessitated proceeding without a warrant. U.S.C.A. Const. Amend. 4.

16. Government employees have as much reason as private employees to expect that their desks and their wastebaskets will be free from invasion by criminal investigators of Government. U.S.C.A. Const. Amend. 4.

20. Concept of privacy is paramount in deciding a claimant's standing to invoke protection of Fourth Amendment.

21. Decisions of Supreme Court that . . . public emplyees are entitled, like all other persons, to benefit of the Fifth Amendment privilege against self-incrimination imply, if they do not mandate . . . that a public employee retains shield of Fourth Amendment while employed in government office. U.S.C.A. Const. Amend. 4,5.

26. When an area in a government office is reserved for exclusive use of a particular employee, that

employee necessarily has a sufficient expectation of privacy in that area, whether it be a desk or wastebasket, or that third party consent to a search by a criminal investigator will be ineffective to bar employee's Fourth Amendment claim in a subsequent prosecution.

30. Where indisputable expectation of employee was that papers will be subsequently disposed of and destroyed without prior inspection by others, wastebasket was not "abandoned by employee when he left his office . . . so long as he remained an employee with an assigned desk under which lay a wastebasket for his exclusive use and employees had standing to challenge legality of warrantless search made of his wastebasket by government agent.

31. Warrantless search made by government agent . . . could not be justified on ground that articles in basket were thrown away and were government property. U.S.C.A. Const. Amend. 4.

32. . . . When there was no special emergency situation nor any exigent circumstances . . . Government could simply have detained waste basket before it was emptied so as to provide enough time to get a warrant.

33. Right of government employees to privacy in a limited area of his office which is devoted to his

exclusive use must be protected from intrusions by investigative and prosecutory arms of Government. U.S.C.A. Const. Amend. 4.

34. (Above) do not affect ability of supervisors in government office to search desk or wastebasket of an employee for official documents which are lost, missing, or needed for business of office . . .

xv) See v. City of Seattle (1967) 387 U.S. 541: Administrative Law and Procedure:

While demand to inspect may be issued by administrative agency in form of subpoena, it may not be made and enforced by inspector in field and subpoenaed party may obtain judicial review of reasonableness of demand prior to suffering penalties for refusing to comply.

9. Basic component of reasonable search under Fourth Amendment is that it not be imposed without suitable warrant procedure.

Unreasonable searches are not warranted. Reasonable searches need a warrant.

xvi) New Jersey v. T.L.O. (1985) 105 S.Ct. 733.83 L.Ed.2d 720:

6. Determining reasonableness of any search involves a two-fold inquiry as to whether action was justified

at its inception and whether search as actually conducted was reasonably related in scope to circumstances which justified interference in the first place.

xvii) U.S.v. Jacobsen (1984) 104 S.Ct. 1652, 80 L.Ed.2d 85:

4) Letters and other sealed packages (e.g. locked desk drawers) are in the general class of effects in which the public at large has a legitimate expectation of privacy and warrantless search of such effects are presumptively unreasonable.

5. Seizure of sealed package may be . . . to prevent destruction of contraband, but a warrant must be obtained "before examining contents of such a package". U.S.C.A. Const. Amend. 4.

11. It is constitutionally reasonable for law enforcement officials to seize with a warrant "effects"that cannot support a justifiable expectation of privacy, based on probable cause to believe they contain contraband.

xviii) Shaffer v. Field, 339 F.Supp. 997 (C.D. Cal. 1972), aff'd 484 F.2D 1196 (CA9 1973):

6. Criteria considered in determining whether warrantless and unconsented to search of locker of petitioner, a former deputy sheriff, was constitutionally justifiable included the

nature of the charge against petitioner (murder), the object of the search (a gun) and whether there existed any regulation or practice which should have put petitioner on reasonable notice that his locker could have been examined by others (three times) without his consent. U.S.C.A. Const. Amend. 4.

xix) Wyman v. Jeames (1971) 400 U.S. 309:

Welfare recipient received notice of visit several days before arrival of non-uniformed "intruder".

xx) Oliver v. U.S. (1984) 104 S.Ct. 1735, 80 L.Ed.2d 214:

6. Open fields (of grain or marijuana) do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance. U.S.C.A. Const. Amend. 4.

7. . . (B)ecause open fields are accessible . . . in ways that a home, office or commercial structure would not be, asserted expectation of privacy in open fields is not one that society recognizes as reasonable.

8. Common law imply . . . that only the land immediately surrounding and associated with the home warrants Fourth Amendment protection that

attaches to the home.

If the hospital is home to the state, petitioners should have charged Dr. Ortega with breaking and entering!

xxi) Davis v. Scherer (1984) 104 S.Ct. 3012:

4. Even defendants who violate constitutional rights enjoy qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard. 42 U.S.C.A. Sec. 1983, U.S.C.A. Const. Amend. 4.

7) . . . If statute or regulation does give rise to cause of action for damages, clear violation of the statute or regulation forfeits immunity only with respect to damages cause by that violation. 42 U.S.C.A. 1983, U.S.C.A. Const. Amend. 4.

xxii) Parratt v. Taylor (1981) 451 U.S. 527:

2. In any section 1983 action initial inquiry must focus on whether two essential elements are present: whether conduct complained of was conducted by person acting under color of state law; and whether this conduct deprived person of rights, privileges or immunities secured by Constitution as laws of the United States. 42 U.S.C.A. Sec. 1983.

3. Some kind of hearing is required at some time before state finally deprives person of his property interests.

4. Fundamental requirement of due process is opportunity to be heard, and it is an opportunity which must be granted at meaningful time and in meaningful manner.

Dr. Ortega did not get even a Skelly hearing after union withdrew legal assistance under pressure from chief petitioner who was also on state bargaining team (Cf. Argument "2-h"). (Skelly was a Caucasian who imbibed and had had one suspension from the medical staff of his hospital.)

xxiii) Paul v. Davis (1976) 424 U.S. 693:

3. The procedural questions of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter interests comprehended within meaning of either "liberty" or "property".

7. While no "right of privacy" is found in . . . the Constitution, "zone of privacy" may be created by more specific . . . guarantees and

thereby impose limits upon government power. U.S.C.A. Const. Amend. 1,4,5,9,14.

This is technical base for Argument Three about the right to be let alone.

xxiv) Perry v. Sindermann (1972) 408 U.S. 593:

6. A persons' interest in a governmental benefit is a "property interest" subject to procedural due process protection if claim of entitlement to the benefit is supported by rules of the agency affirming the benefit or by mutually expedient understanding. U.S.C.A. Const. Amend. 14.

S.P.B. refused to issue any subpoenas.

xxv) Pickering v. Board of Education (1968) 391 U.S. 563:

3. Where State Court, in action by dismissed teacher against board of education seeking reinstatement, at no time gave de novo consideration to statements contained in teacher's letter, which constituted basis for teacher's dismissal, Supreme Court was free to examine evidence in case completely independently, and to afford little weight to factual determination made by board of education.

S.P.B. decision on March 8, 1981 did

not have the benefit of finished transcripts of the hearings, but rehearing was denied.

xxvi) Carey v. Piphus (1978) 435 U.S. 247:

6. Denial of procedural due process should be actionable for nominal damages without proof of actual injury. 42 U.S.C.A. Sec. 1983, U.S.C.A. Const. Amend. 14.

Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.

The cardinal priniciple of damages in Anglo-American law is that of "COMPENSATION for the injury caused to plaintiff by defendant's breach of duty". 2 F. Harper and F. Jones, Law of Torts, Sec. 25.1, p. 1299 (1956) (emphasis in original).

xxvii) Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971):

". . . The question then, is . . . whether compensatory relief is

"necessary" or "appropriate" to the vindication of the interest asserted. . . Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects in future official lawlessness might be thought to result. . ."

xxviii) Mt. Healthy City Board of Ed. v. Doyle (1977) 429 U.S. 274:

1) Entitlement to more than $10,000 in damages confer . . . (federal) jurisdiction . . . 28 USCA Sec. 1331, USCA 1,14.

xxix) Terry v. Ohio (1968) 392 U.S. 1:

6. . . . Courts will not be made party to lawless(ness) . . . by permitting unhindered governmental use of fruits (there)of. . .

13) Scope of search must be strictly tied to and justified by circumstances which rendered its initiation permissible.

14) . . . (F)acts must be judged against objective standard of whether facts available to officer at moment of seizure or search would (mean) to man of reason . . . that action taken was appropriate.

28. Fourth Amendment proceeds as much by limitations upon scope of governmental action as by imposing

preconditions upon its initiation.

xxx) Monroe v. Pape (1961) 365 U.S. 167:

2. Allegations of facts constituting a deprivation . . . satisfy requirements of statute making any person who, under color of state statute, ordinance, etc., deprives any citizen of his constitutional rights liable to party injured. U.S.C.A. 4,14,42 U.S.C.A. Sec. 1983.

5) One reason for passage of federal statute . . .was to afford a federal right in federal courts where, because of passion, prejudice, neglect, intolerance or otherwise, state laws might not be enforced and claim of citizen to enjoyment of rights, privileges, and immunity guaranteed by the Fourteenth Amendment might be denied by state agencies. 42 U.S.C.A. Const. Amend. 14.

6) . . . (F)ederal remedy is supplementary to the state, and state remedy, if any, need not be first sought and refused before federal one is invoked. 42 U.S.C.A. Sec. 1983.

RESPONDENT'S PRECEDENTS IN OPPOSITION:

1) In U.S. v. Hagarty (7th Cir. 1968) 388 F2d 713, the Court held that the Fourth Amendment protected conversations in a closed office, because the Fourth Amendment applies wherever a person conducts activity with an objectively reasonable expecta-

tion of constitutional protection from search and seizure. The state had argued (as do California and the U.S. Department of Justice) that:

"(T)he fourth amendment does not apply to the search of governmental premises in the course of an investigation relating to the conduct of governmental business."

The court rejected this argument and found that the search by the investigators was "part of an effort to secure evidence of crime" and was therefore the kind of search prohibited by the fourth amendment. Id. at 717. If amateur investigators can be believed under oath (II:168 et. seq.), so was their "administrative inventory" a search for forgery!

For the last 17 years since HAGARTY, there had only been one case cited by petitioners (PB 11: r. 37-40!) where the state is at risk

for doing its job of oversight. Can we really afford to sleep on the job of schooling our overseers who were asleep during their elementary civics class on the Bill of Rights? P.B. 24.

2) In Mapp v. Ohio (1961) 367 U.S. 643, the United States Supreme Court held that the purpose of the Fourth Amendment exclusionary rule was to deter violations of the privacy of citizens by police officers.

3) In People v. Superior Ct. (Tyler) (1981) 115 Cal.App.3d 557, 171 Cal.Rptr. 448, the court held that the defendant had reasonable expectation of privacy in his suitcase located in his automobile.

4) In U.S. v. Hitchcock, 467 F.2d 1107, 1108 (9th Cir. 1972), the Court found that a warrantless search of a prison cell does not violate the Fourth Amendment, since "it is obvious that a jail shares none of the privacy of a home, an automobile, AN OFFICE, or a hotel room. In prison, official surveillance has traditionally been the order of the day.

5) In U.S. v. Speights (3rd Cir. 1977) 557 F2d 362, the Court found the police officer's locked locker at

headquarters was protected by the Fourth Amendment from warrantless search by superiors.

Most of the exceptions to the warrant requirement involve some sort of exigent circumstances such as an immediate danger to the police officers or to the community [see, e.g, TERRY v. Ohio (1968) 392 US 1, 88 SCt 1868, 20 LEd2d 889], or the risk that the evidence could vanish or be destroyed while a warrant is being obtained. [Cf. SCHMERBER v. California (1966) 384 US 757, 86 SCt 1826, 16 LEd2d 908.]

6) In U.S. v. Blok (D.C. Cir. 1951) 188 F2d 1091), the District of Columbia police had searched her desk without a warrant for evidence of petty larceny:

> "We think appellees exclusive right to use the desk assigned to her made the search of it unreasonable. . . Her official supervisors might reasonably have searched the desk for official property needed for official use. . . In absence of a valid regulation to the contrary, appellee was entitled to, and did, keep private property of a

personal sort in her desk. Her supervisors could not reasonably search the desk for her purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office. Their consent did not make such a search by the police reasonable. Operation of a government agency and enforcement of criminal law do not amalgamate to give a right of search beyond the scope of either."

7) In Coolidge v. New Hampshire, 403 U.S. (1971) 443, 454-55, 91 SCt 2022, 2031-32, 29 LED 564), the Supreme Court has held that warrantless searches

"are per se unreasonable under the fourth amendment -- subject only to a few specifically established and well-delineated exceptions".

8) Screws v. U.S., 325 U.S. 91, 65 S.Ct. 10312 requires a finding of specific intent in order to sustain a conviction under the cognate penal provisions of 18 U.S.C. Sec 242, 18 U.S.C.A. Sec 242:

"an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them. 32 U.S. at 104, 65 S.Ct. at 1037.

The word "willfully" in 18 U.S.C. Sec. 242, 12 U.S.C.A. Sec. 242, from which

the requirement of intent was derived in SCREWS does not appear in Sec. 1979. Sec. 1979, by the very fact that it is a civil provision, invites treatment different from that to be given its criminal analogue. The constitutional scruples concerning vagueness which were deemed to compel the SCREWS constraint have less force in the context of a civil proceeding, and 1979, insofar as it creates an action for damages, must be read in light of the familiar basis of tort liability that a man is responsible for the natural consequences of his acts.

The SCREWS opinion itself concedes:

> "The fact that the defendant may not have been thinking in constitutional terms is not material where their aim is not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. 315 U.S. at 106, 65 S.Ct. at 1037.

9) Baltimore and Ohio R. Co. v. Groeger, 26 U.S. 521: Civil liability has always been drawn from such indefinite standards as reasonable care. a man of ordinary prudence, forseeability, etc.

10) Bell v. Hand, 327 US. at 84, 66 S.Ct. at 777:

> "(I)t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such an invasion, federal courts may used ANY available remedy to make good the wrong done." (Emphasis added.)

11) Ward v. Strickland, 420 U.S. at 319, 95 S.Ct. at 999:

> Damages are available under Section 1983 for actions "found to have been violative . . . of constitutional rights and to have caused compensable injury.

In deciding on the damages, the substance of the violation must be considered:

A: the importance of the particular interest violated;

B: the extent of deviation from

lawful conduct;

C: the extent to which the violation was willful;

E: the extent to which privacy was invaded; and

F: whether the things seized would have been discovered.

Although discovery procedures encourage "fishing expeditions" that are prohibited by search and seizure laws, Dr. Sutton's ten-year-old souvenirs would not have been within reach, whether she was a former staff member of the hospital, or a former medical resident under her married name ten years before.

IN FINE, the constitutional question is whether (a) an administrative investigation is (b) an invitation to snoop (c) after sending the peon away (d) from his associates (e) on "vacation" without pay in order to (f) look into his private files (g) for evidence (h) to blackmail him or his with or (i) dismiss him on any charge and (j) make him appeal without hope of redress (k) to exhaust his savings if he refuses to resign, (l) harass his supporters with souvenirs and (m) ruin his reputation, if (n) they can but get away with it (o) scot-free.

OR, whether it is NOT a violation of a government employee's civilian (private or human) rights under the FIRST (peacably to assemble and petition for redress), FOURTH (to be secure in their persons, houses, papers, and effects), FIFTH (not to be witness against himself or be deprived of liberty or property without due process or just compensation), SIXTH (to a speedy and public trial and to be confronted with witnesses and to obtain his own), SEVENTH (to a jury trial according to the rules of common law), EIGHTH (not to be fined or punished excessively), NINTH (not to lose any rights retained by the people), TENTH (to reserve what rights have been retained by referendum with the 1972 Amendment to the State Constitution to guarantee privacy to its people in state

institutions or at home), and the FOURTEENTH Amendments (protecting persons as well as citizens) arbitrarily to place him on administrative leave in order to make a secret, if abortive, inventory of his personal papers and professional correspondence in a government office assigned BUT denied to him while he is undergoing an internal investigation of his management practices and to impound everything in it during his appeal against dismissal while denying him the right to subpoena and confront his accusers or their supporters or to testify in a public hearing so that his testimony will not be heard and can be shared only between the hearing officer and opposing counsel who added the charge of coercion that their witnesses denied under oath.

FROM RECORD OF FEDERAL PROCEEDINGS

Below are what were once designated for inclusion in the Joint Appendix, which did not get served in time.

1) Motion for Summary Judgment or Order Specifying Facts, March 12, 1984; Statement of Facts in Support, and Memorandum of Authorities, March 13, 1984; and Opposition to Motion for Summary Judgment, March 26, 1984, in Case No. 82-4045;

2) Appellant's reply brief, January 22, 1985 in Case No. 84-2169, Ortega v. O'Conor (in addition to Respondent's Reply to Petition for Certiorari, Case No. 85-830);

3) Excerpts of the rest that was submitted and cited in Request for Judicial Notice in present petitioners' Motion for Summary Judgment to District Court, March 14, 1984.

[Below are parts thereof, the rest in accompanying Appendix under Rule 30.6.]

Dr. O'CONNOR's Deposition,
Apr. 27, 1983, Page 18:

> Q: Now what specifically were the reasons supporting your conclusion that you were justified in putting Dr. Ortega on administrative leave when you did so in August of 1981?
>
> A: Specifically they revolved essentially around concerns of what my hospital administrator (Mr. Friday) felt were violations of contractual procedures, had to do with the obtaining a computer by means which seemed to be cloudy at best, at that time, had to do with an allegation by one of the doctor's supervisees (Dr. Vaughn) that the residents had [been] coerced to provide donations to purchase a computer which I thought had been donated by a company. . .

[Coercion is easily established, but cannot be proved by paper search, which makes seizure of all office contents unwarranted. Dr. Vaughn was never invited to contribute, and coercion can be investigated by simply talking to contributors. After doing so, no charge

of coercion was included in Notice of Punitive Action.]

Page 51, Dr. O'CONNOR's deposition:

Q: In other words, that the State has the authority to go in and look through all of the person's belongings to see whether they are public property or personal property; is that what you are saying?
A: Yes.

Q: But in fact, some of the personal items were used in the hearing against Dr. Ortega; isn't that correct?
A: Yes.

Page 60, Dr. O'CONNOR's deposition:

Q: Had this practice of going into doctors' offices have ever been done at Napa State Hospital?
A: I recall an instance in which we found in an office -- Well, I amnot sure exactly, but there was an episode where we found information in an office that led us to believe that there were reasons for adverse action.

[After Dr. Ortega was dismissed, a love letter by a patient to a member of the nursing staff was used to dismiss him.]

Q: So, you have gone into somebody's office in another oc-

casion without their permission?

A: I don't recall whether or not we had the permission. I don't know if the person was there or not. This was five or six years ago.

Q: Is it any part of the hospital's rules, regulations that an employee cannot have personal property or belongings in his or her office.

A: There is no rule against that.

Page 61, Dr. O'CONNOR's deposition:

Q: Were there any files relating to private patients that were discovered in Dr. Ortega's office so far as you know?

A: I believe there was, yes.

Q: Do you know if anybody entered or reviewed the contents of those files?

A: My only recollection of what it was was some billings or something like that and we had wondered whether or not he performed certain duties of private practice on State Hospital time, but we did not pursue that.

Q: You're talking about (M)edi-(C)al billings?

A: I think so, yes.

Q: Somebody viewed those files, and whether they constituted improper billing --

A: We thought there might be

that Dr. Ortega was using his office or State time to conduct other than what his job as Chief of Professional Education was, but again, there was no evidence to pursue that and that was not part of his punitive action. (Cf. Exx. L and xxi.)

Q: Did you see the contents of these particular patients relating to the outside?

A: I vaguely recall seeing a bill regarding something (M)edi-(C)al, but I didn't pursue it.

Q: Do you know if anybody did pursue it?

A: I don't think so, not to my knowledge . . .

Page 73, Dr. O'CONNOR's deposition:

Q: What's the answer to the question, though? Is it the contention of the hospital that the State or the hospital has the right to review and look at any employee's personal property which is not State property without that employee's permission?

A: Well, it would be my position basically that under certain circumstances, the State would have the right to enter a State office and to make a determination as to what is State and what is not the State's. In fact, that's what happened in this case.

[Thus, the investigation was only the cover for the resolve to get rid of Dr. Ortega and all his belongings as soon as possible, even pack them for him.]

Mr. FRIDAY's Deposition,
June 28, 1983, Page 40:

Q: In other words, the practice, what we've just been talking about, is there any other such practice that's been employed in State hospitals in California?

A: To what?

Q: To have management enter an employee's room without their permission and sort through their personal goods, and sort them out from the State property?

A: At least, let me say my practice is to - -

Q: This is your personal practice?

A: This is my personal practice as hospital administrator, is not to inspect if it's identified as somebody's personal things, not to go through it. If there was a knapsack sitting there -- we have social workers, for example that carry around knapsacks. That I would not go through that. That, I would consider personal. But the practice is to go through what is considered a bona fide business activity that the employee is hired

to carry out for the state.

Q: This policy that you yourself have, that's not in writing anywhere, is it?
A: No, but it's the policy I tell my people.

Page 26, Mr. Friday's deposition:

Q: Did you use this special key to his office to enter?
A: That's correct.

Q: It was just one key, or were duplicates made?
A: No, just one key.

Q: In relation to the date that Dr. Ortega was placed on administrative leave, August 17, approximately when did you enter his office?
A: I'd say probably within five or six days, something to that effect.

Q: Was it during a regular work day?
A: No, it wasn't.

Q: In an evening?
A: It was an evening.

Q: Was anyone else present at the time?
A: No.

Q: Was anyone else present even in the entire department when you went in?

A: No.

Q: My purpose was to make sure that the work was proceeding in terms of boxing items up, separating things, and so forth.

[Dr. Ortega was to be sent "packing".]

Page 33, Mr. FRIDAY's deposition:

Q: Who gave it back to you?
A: I had the key. No one gave it back to me. . .

Q: You had basically control and custody of the key?
A: That's right.

Page 39, Mr. FRIDAY's deposition:

Q: So far as you know, Dr. Ortega was never given a key to the new lock, was he?
A: No, he never asked for one.

Q: Would you have given him one if he asked for one?
A: No.

Q: So, in fact, he could not enter his office, right?
A: That's right.

Q: Did you know of any other instances in Napa State Hospital when an employee was locked out of their office and could not reenter?
A: Not at Napa, but at other hospitals.

[What was so precious about state papers that the occupant might not leave behind for officers to enjoy?]

Mr. STRATTON's Deposition, December 1, 1983, Page 46:

Q: Have you personally been involved in any other situations like this when an employee's office was entered and the locks changed.
A: Me, personally, no.

Q: But you have heard of other occasions in which this has been done.
A: That is possible.

Q: What do you mean it is possible? Do you recall?
A: I don't recall. I might have heard it, but I don't recall hearing it.

Page 7, Mr. STRATTON's deposition:

Q: Okay. Now, you didn't find any log or summary of what was taken from his office?
A: No, sir, I removed the stuff myself, and I did not make a log or summary of it.

Q: You didn't make notes or anything?
A: No, I did not.

Q: Did you start to make notes?

A: At the beginning, I started to, then it was superfluous, and I threw everything away and boxed it all up.

[That was the objective all the time.]

Q: What do you mean it was superfluous?

A. There was so much stuff. Trying to sort State from non-State, it was too much to do, so I gave it up and boxed it up.

[The investigators were such amateurs, they cannot inventory what they seize.]

Page 8, Mr. STRATTON's deposition:

Q: How many pages had you written before you threw it away?

A: Maybe two sentences.

. . .

Q: And did you ask anyone else who is your superior whether that was okey to no longer log them?

A: No, I did not.

Q: You just decided that on your own?

A: That's correct. Well, I did talk to Mr. Friday and told him it was a difficult task and that I would not make a log, and so I did not.

[Their primary excuse had no priority!]

Q: And he said that was all right?
A: Yes.

Q: Do you know if anybody else made a log of these contents?
A: Nobody else did, to my knowledge.

[Need to do an inventory was invented.]

Page 41, Mr. STRATTON's deposition:

Q: . . . (Mr. Friday) just said Dr. Ortega is on administrative leave and said search his office?
A: He didn't tellme to search his office; he told me to go down and remove his stuff, sort it out.

[That sequence was much more accurate.]

Q: Did he tell you to look for anything in particular?
A: Only to separate out between State and personal property.

[Before separating Dr. Ortega himself.]

Page 47, Mr. STRATTON's deposition:

Q: So far as you know, was it standard practice then at the hospital when someone is terminated, an employee, to immediately change their locks?
A: Maybe not in every instance, but yes.

Q: Was it also the policy of the hospital to go into their

possessions and sort out personal things from State things?
A: To my knowledge, yes.

Q: Because you had been involved in some similar kinds of situations of other employees who had been terminated?
A: Yes.

[The inventory was not investigatory!]

Page 60, Mr. STRATTON's deposition:

Q: Now, the boxes were taken out of Dr. Ortega's office and taken over to your office?
A: That is correct.

Q: And they were later taken to another evidence locker?
A: Yes, that's correct.

. . .
Q: And who instructed you to do that?
A. I think I asked Mr. Friday if I could do that to get them out of my office.

. . .
Q: When you saw this picture of Dr. Sutton, what did you do with it at that time?
A: I handed it to Dr. Laskay.

. . .
Q: Was there a Valentine with it? In fact, wasn't there a whole file under Dr. Sutton's name?
A: I don't remember if it was

or not. I remember it was in a desk drawer.

[Why was her photograph handed around?]

SUPPLEMENTAL DECLARATION BY M. J. ORTEGA
March 26, 1984

"2. During the hearings before the State Personnel Board . . . I raised the issue of the illegality of the search and seizure of my office, and the seizure of my personal goods and belongings, as well as their used against me in evidence. I contended that said break-in and seizure was a violation of my Constitutional rights under the Fourth Amendment and an invasion of privacy.

"3. . . . (T)he State of California was well aware that I was making these allegations of illegality in violation of my Constitutional and statutory rights. . ."

"s/M.J.O.

They were broached on the FIRST DAY of the hearing:

I: 4/11 - 6/16 (r. 16, 20, 24, 23, 26, 52):

G.C. 19574.5, Skelly, discovery, invasion of privacy, illegal seizure, expropriatio, second use of information:

Dr. Ortega: Can I ask if the State can deprive me of one thousand dollars on the basis of hearsay . . .?

Hearing Officer: Hearsay evidence is admissible in an administrative hearing. . .

Q: Okay. Do the pre-removal safeguard . . . guaranted all permanent employees include not only notice . . . but also of the materials upon which the decision is based so that the right to respond is not just an empty promise?

A: . . . If they didn't, it would merely postpone the effective date of any action taken thereunder. . .

Q: Am I entitled to see the evidence that made the State start an investigation?

A: . . . It's going to be covered in evidence when witnesses are actually called(!)

Q: Can the State search my personal belongings without my permission?

A: . . . We'd have to hear the evidence in the case before we could make a ruling on that type of issue.

Q: In the meantime, before that ruling is made, can we suppress the evidence that may have come from such a search?

Hearing Officer: We never suppress evidence in an administrative hearing. That's strictly in

criminal courts.]

UNTIMELY SUBMISSIONS TO FEDERAL COURT BY ATTORNEY GENERAL

"April 9, 1984

"Dear Judge Vukasin:

"On March 28, 1984 you granted the motion for summary judgment . . . Prior to my drafting a proposed order per your instructions I wish to provide the court with (Mr. James Stratton's) depositions corrections which are relevant to the court's determination.

"These corrections are based upon the fact that Mr. Stratton's testimony, THOUGH CORRECT WHEN GIVEN, is no longer accurate given new information which he received. . .

"Mr. Stratton's corrections are based upon his post-deposition review of a document which may not previously have been provided to (Dr. Ortega) and the existence of which may not have been disclosed.

[It was required to be furnished to Dr. Ortega by State Superior Court Order on November 2, 1981, granting discovery of all "investigative notes", Exhibit H: 2) That (Dr. Ortega) be furnished any

statements taken relating to persons IN CONNECTION WITH THE INVESTIGATION.]

> "I received a copy of the document to which the deposition corrections make reference on April 5, 1984 and I have enclosed it for your review. The State claims that this document is privileged as is more fully set forth below. This document is a PRELIMINARY INTERNAL INVESTIGATIVE REPORT which consists of the notes, impressions and reflections of Dr. Laskay relative to the interviews he conducted with individuals at Napa State Hospital regarding the performance of Dr. Ortega. . .

[In fact, the notes include statements made by people out of state who were contacted by telephone, from numbers taken from triple-locked private papers in a drawer of a desk in an office.]

> "Attached to the report are copies of documents he apparently utilized in his investigation. [Dr. Laskay is deceased so it is not possible to question him about these duplicates.] . . ."
>
> "s/Nancy S. Wainwright, Deputy Attorney General

[Dr. Ortega kept waiting for a Court

Order to have these duplicates surrendered to him, and would not accept what they have been copied from unless all copies were also tendered. (They must be surrendered by court order to respondent/owner of originals.) State attorneys insinuated that Dr. Ortega could not have been interested in his memorabilia. (Why would he have kept them all these years?) From careless packing, many of them are torn beyond repair.]

From Dr. Ortega's attorney:

April 12, 1984

Dear Judge Vukasin:

I was shocked and outraged to receive today . . . nearly total and complete changes to the deposition of Officer Stratton.

There has been no showing, nor even any attempted showing, why this information could not have been submitted in the regular course of the cross-motions for summary judgment.

The revision of Officer Stratton's deposition is not a revision, but a total reversal of his testimony. . . I ask that it (the opposite version) be stricken.

Furthermore, the conclusion is inescapable that defendants believe that they have inadequate bases or grounds for the . . . summary judgment, and are attempting to correct and revise the record after the fact.

[The courtroom audience agreed with Dr. Ortega's counsel, and so did the Court of Appeals.]

It was specifically represented to me that all such documents had been disclosed. This alone is sufficient grounds on which to strike the submission. . .

There is no authority for an attorney in litigation to submit a document ex part to the judge hearing the case, without benefit of court order or motion procedure. . .

Therefore, I ask for an Order compelling the defendants to immediately disclose and produce the entire document (to Dr. Ortega), and for sanctions as attorney's fees for failure to produce said documents according to the duly-noticed request for production of documents. . .

From AMENDED PETITION
FOR WRIT OF MANDATE,
Case No. 44526 (r.29)

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN
AND FOR THE COUNTY OF NAPA

Dated: 1 April 1985

FIVE. (Dr. Ortega's) Right to a Fair Hearing was Violated by the Secret Non-Disclosure by Defendants of Available Evidence Relating to the Charges Against (Dr. Ortega).

As indicated in the supporting Declaration attached hereto, some two years after the hearings herein, the Deputy Attorney General . . . in a Federal Court case revealed that there was an undisclosed document consisting of a "preliminary internal investigative report", consisting of the notes, impressions and reflections of Dr. Laskay, one of the members of the investigative team, relative to the interviews he conducted with individuals at Napa State Hospital regarding the performance of Dr. Ortega. The utilization of this document (by Dr. Ortega) may very well have altered the outcome of the administrative hearing, had he had access to it. In the State Personnel Board hearing below, the respondents refused to properly comply with discovery, necessitating (Dr. Ortega) obtaining an order from the Napa County Superior Court ordering . . . to comply with discovery. In addition, Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 215, held that

"due process" does mandate that the employee be accorded certain procedural rights BEFORE discipline becomes effective. As a minimum, these pre-removal safeguards must include notice of the proposed action, the reasons therefor, A COPY OF THE CHARGES AND MATERIALS UPON WHICH THEIR ACTION IS BASED, and the right to respond, either orally or in writing, to the authority (Dr. O'Connor) initially imposing discipline" (emphasis added). In this case, it is clear that petitioner was not allowed to review the "materials upon which the action is based", which under SKELLY was required to be given to him prior to the initial taking of punitive action. This violation alone is sufficient to reverse the Personnel Board decision, on the grounds that petitioner did not have a fair hearing.

DECLARATION IN SUPPORT OF AMENDED MANDAMUS PETITION:

2. I am also the plaintiff in a Federal suit . . . currently on appeal before the Ninth Circuit.

3. Private patient files and billings were examined according to defendant O'Connor's deposition, in violation of G.C. Sec. 6254(c), and field investigation of fraud in disregard of G.C. Sec. 11180.5 ended with dire threats. Exhibit L.

4. On April 9, 1984, after

substantial and lengthy discovery had been undertaken by the parties, and after defendants' Motion for Summary Judgment had already been argued and decided, the Attorney General's Office, on behalf of defendants, informed the Court of the existence of a preliminary investigative report which had not previously been provided to plaintiff, either in the District Court suit or in petitioner's previous hearing before the State Personnel Board.

5. The attorney sent a copy to the District Court Judge, claiming that it was privileged, and describing it as a "preliminary internal investigative report which consists of the notes, impressions and reflections of Dr. Laskay (one of the members of the team investigating petitioner) relative to the interviews he conducted with individuals at Napa State Hospital regarding the performance of Dr. Ortega".

[In fact, Dr. Laskay called alumni all over the United States to develop leads when the investigation came up empty.]

The attorney admitted that attached to the report are copies of documents which Dr. Laskay "apparently utilized in his investigation".

8. The secret disclosure and failure

to reveal said investigative report, including notes and conversations with witnesses (and interviewees), violated the previous order of the Superior Court, attached hereto as Exhibit (H), to produce all discovery to petitioner herein, as well as violating Skelly v. State Personnel Board (1975) 15 Cal.3d 194, which required that a state employer produce all investigative and other materials relied upon or relating to the termination procedure before the State Personnel Board. The content of this investigative report (negative as well as positive) would have assisted petitioner significantly in his defense and improved his ability to cross-examine witnesses. Its contents might very well have altered the outcome of the hearing before the State Personnel Board. . .

Dated this 1st day of April, 1985, in Napa California.